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No. 08-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States OFFICE OF THE CLERK

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

ADAM LEITMAN BAILEY
Counsel of Record
WILLIAM J. GELLER
JESSICA SCHERER
DOV TREIMAN
ADAM LEITMAN BAILEY, P.C.
120 Broadway, 17th Floor
New York, New York 10271
(212) 825-0365

Counsel for Petitioner

(Additional Counsel Listed on Signature Page)

QUESTIONS PRESENTED

Petitioner has lost its valuable building in New York City to a tax foreclosure sale without having received any notice of the proceedings because the certified mailing of the notice to Petitioner was returned "unclaimed" and no follow-up notice was attempted, a violation of *Jones v. Flowers*, 547 U.S. 220 (2006).

The decision below found *Jones* inapplicable because the City had conveyed the tax lien foreclosed to a trust established to securitize City tax liens into bonds, turning tax delinquencies into quick cash. The trust was held to be a "private actor" despite its creation by the City, the City's ownership of and residuary interest in the trust and a code provision mandating that the trust "stand in the same position as the city" with respect to the tax liens sold.

The trust served the foreclosure summons by turning it over to the New York Secretary of State, who sent it certified mail to an obsolete address for Petitioner, causing the mailing to be returned "unclaimed." The trust never inquired whether the mailing was delivered or not, and otherwise made no effort to give actual notice to the Petitioner, despite the trust's having Petitioner's address readily available; a trial court order to serve an interlocutory paper on Petitioner, which the trust ignored; and Petitioner's continuing payments of taxes in ignorance of these proceedings.

As such, this Petition presents two questions regarding notice of a tax lien foreclosure proceeding:

1) May a city avoid responsibility for the due process notice obligations of a governmental actor by conveying tax liens to a trust created by the city in order to reduce its duties under the Fourteenth Amendment to those of a mere private actor?

2) May a city-created tax lien trust avoid the due process requirement to attempt additional notice when the initial notice is returned unclaimed, as set out in *Jones v. Flowers*, by electing to serve a foreclosure summons through a state official, with full knowledge that the official will not inform the trust if the certified mailing of the summons is returned, and then by foreclosing on default without asking the official whether the summons was delivered?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, 114 Tenth Avenue Assoc., Inc. is a New York corporation wholly owned by an individual shareholder, Mr. Zvadin Krstic.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	viii
INTRODUCTION	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	5
A. The Establishment and Operation of the Trust	5
B. The Trust's Service Upon 114 Tenth	8
C. Proceedings After 114 Tenth Learned of the Foreclosure	10

Contents

Page

REASONS FOR GRANTING THE PETITION 12

I THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW ERRED IN FINDING THAT THE TRUST WAS A PRIVATE ACTOR NOT BOUND BY FOURTEENTH AMENDMENT OBLIGATIONS 12

II THE PETITION SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING PROPER NOTICE OF THE FORECLOSURE ACTION 16

A. New York and the Majority of States Permit Substituted Service on a State Official Where the Official Mails Notice but Does Not Inform the Plaintiff When the Official Learns the Defendant Did Not Receive the Mailing 18

B. New York BCL § 306(b), Without Any Other Efforts To Give Notice, Does Not Provide Reasonable Notice To Property Owners in Tax Foreclosures 21

Contents

Page

C. Since the Trust Elected to Provide Notice Through a Government Official, The Trust Is Responsible for the Actions of the Official 26

D. The Decision Below Conflicts with the Holdings of Other State and Federal Courts, Which Do Not Permit Mere Statutory Compliance To Excuse Further Notice Warranted Under the Circumstances 30

D. By Failing to Provide Further Notice Here, the Trust Denied 114 Tenth The Due Process Required by the Fourteenth Amendment 31

CONCLUSION 33

TABLE OF APPENDICES

Page

Appendix A — Order Of The Supreme Court Of The State Of New York, Appellate Division, First Department Entered October 30, 2007 ..... 1a

Appendix B — Order Of The Supreme Court, Appellate Division, First Department Dated February 26, 2008 ..... 4a

Appendix C — Decision And Order Of The Supreme Court Of The State Of New York, County Of New York: Part 51 Filed December 20, 2006 ..... 6a

Appendix D — Order Of The Supreme Court Of The State Of New York, New York County Filed September 22, 2005 ..... 13a

Appendix E — Order Of The State Of New York, Court Of Appeals Dated February 19, 2008 .. 16a

Appendix F — Order Of The State Of New York, Court Of Appeals Dated June 3, 2008 ..... 18a

Appendix G — Provisions Of The New York Business Corporations Law 20a

Appendix H — Provisions Of The New York City Administrative Code 22a

TABLE OF CITED AUTHORITIES

Page

CASES

Aponte v. Raychuk,
78 N.Y.2d 992, 580 N.E.2d 758,
575 N.Y.S.2d 272 (1991) 4

Brentwood Academy
v. Tenn. Secondary School Athletic Ass'n,
531 U.S. 288 (2001) 13, 14

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 3

Evans v. Newton,
382 U.S. 296 (1966) 13, 14

Gotthilf v. Sills,
375 U.S. 79 (1963) 4

Greene v. Lindsey,
456 U.S. 444 (1982) 21

Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974) 13

Jones v. Flowers,
547 U.S. 220 (2006) ..... *passim*

Lebron v. National R.R. Passenger Corp.,
513 U.S. 374 (1995) 13

Cited Authorities

Page

Leighton v. Roper,
300 N.Y. 434, 91 N.E.2d 876 (1950) 19

Lincoln Savings Bank v. Warren,
72 N.Y.2d 883, 528 N.E.2d 518,
532 N.Y.S.2d 366 (1988) 4

Micarelli v. Regal Apparel, Ltd.,
52 A.D.2d 524, 381 N.Y.S.2d 511
(1st Dep't 1976) 22

In re Mill Creek Phase 1 Staten Island Bluebelt System, 10 N.Y.3d 898,
2008 N.Y. Slip Op. 05304, 2008 WL 2338631
(June 10, 2008) 7, 14, 24

Mintz v. Astoria Holding Corp.,
56 A.D.2d 595, 391 N.Y.S.2d 650
(2d Dep't 1977) 23

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983) 31

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) ..... *passim*

New York Housing Authority v. Fountain,
172 Misc.2d 784, 660 N.Y.S.2d 247
(N.Y.C. Civ. Ct. 1997) 9

Cited Authorities

Page

NYCTL-1 Trust v. Liberty Bay Realty Corp.,
21 A.D.3d 1013, 801 N.Y.S.2d 346
(2d Dept. 2005) 23

NYCTL 1996-1 Trust v. LFJ Realty Corp.,
307 A.D.2d 957, 763 N.Y.S.2d 836
(2d Dep't 2003) 25

NYCTL 1998-1 Trust v. Oneg Shabbos Inc.,
8 Misc. 3d 645, 800 N.Y.S.2d 808
(Sup. Ct. 2005), *modified on other grounds*,
37 A.D.3d 789, 830 N.Y.S.2d 763
(2d Dep't 2007) 22-23, 25

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 25

Radio Station WOW v. Johnson,
326 U.S. 120 (1945) 3

Raschel v. Rish,
69 N.Y.2d 694, 504 N.E.2d 389,
512 N.Y.S.2d 22 (1986) 10-11

Republic National Gas Co. v. Oklahoma,
344 U.S. 62 (1948) 3

Robinson v. Hanrahan,
409 U.S. 38 (1972) 25

Cited Authorities

Page

Sidun v. Wayne County Treasurer,
481 Mich. 503, 751 N.W.2d 453 (2008) 30-31

Spearman v. Atreet Corp.,
238 A.D.2d 194, 656 N.Y.S.2d 30
(1st Dep't 1997) 22

Stein v. A. Matarasso & Co.,
143 A.D.2d 825, 533 N.Y.S.2d 126
(2d Dep't 1988) 24

Tayor v. Westly,
488 F.3d 1197 (9th Cir. 2007) 28

Thompson-Green v. Estate of Drobish,
142 P.3d 897, 2006 WY 126 (Wyo. 2006) 27, 28

In re Treasurer of Wayne County for Foreclosure,
478 Mich. 1, 732 N.W.2d 458 (2007) 30

U.S. v. McGlory,
202 F.3d 664 (3d Cir. 2000) (en banc) 28, 29

U.S. v. One Star Class Sloop Sailboat,
458 F.3d 16 (1st Cir. 2006) 30

Volkswagenwerk Aktiengesellschaft v. Schlunk,
486 U.S. 694 (1988) 18, 23

Vosilla v. Rosado,
944 So.2d 289 (Fla. 2006) 31

Cited Authorities

Page

Wilson v. Blount County,
207 S.W.3d 741 (Tenn. 2006) 28, 31

Wuchter v. Pizzutti,
276 U.S. 13 (1928) 18, 23

CONSTITUTIONAL PROVISION AND STATUTES

28 U.S.C. § 1257 ..... 2, 3, 4, 5

28 U.S.C. § 2403(b) 2

42 U.S.C. § 1983 28

Federal Rule of Civil Procedure 4(h)(1) 18

Montana Rule of Civil Procedure 4(D)(6) 20

New York Business Corporations Law (BCL)
§ 304(a) 5, 23

New York Business Corporations Law (BCL)
§ 306(b) ..... *passim*

New York Business Corporations Law (BCL)
§ 307 ..... 19, 24

New York Business Corporations Law (BCL)
§ 308 ..... 5, 9, 22

Cited Authorities

Page

New York Civil Practice Law & Rules (CPLR) 311 24

New York City Administrative Code (NYC Code) § 11-319(b)(2)(i) 5, 6

New York City Administrative Code (NYC Code) § 11-332(a) 5, 7, 14, 26

New York City Administrative Code (NYC Code) § 11-335 5

New York City Administrative Code (NYC Code) § 11-340 5

New York City Administrative Code (NYC Code) § 11-347 ..... 5, 7

New York Real Property Actions & Proceedings Law § 1362 3

U.S. Constitution, Fourteenth Amendment, due process clause ..... *passim*

Page

OTHER AUTHORITIES

Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747 (2000) 15

Karger, Arthur, Powers of the New York Court of Appeals § 4:15 at 93-94 (rev. 3d ed. 2005) ... 4

Restatement (Second) of Agency, § 1, cmt f. (1958) 19, 23

Siegel, David D., Practice Commentaries to N.Y. Civil Practice Law & Rules 5015, C5015:6 (McKinney's 2007) 23

U.S Postal Service, Domestic Mail Manual § 602.1.4.2 (July 3, 2008) 10

INTRODUCTION

In 2006, this Court decided *Jones v. Flowers*, 547 U.S. 220 (2006), clarifying an important principle of the ordered liberties cherished in this nation: That a government seizing private lands for nonpayment of taxes has a duty to its own citizens to act as one who genuinely desires that the taxpayer receive fair notice of the foreclosure. Rejecting this important principle, the Appellate Division of New York's Supreme Court allowed New York City to avoid its duty to provide due process to its property owners by letting stand the foreclosure of a City tax lien. The Appellate Division inappropriately accepted two artificial distinctions between the foreclosure involved here and that in *Jones*, namely that the foreclosure was prosecuted by a trust the City created, and not the City itself; and that the foreclosure notice was returned after the trust caused it to be mailed by the New York Secretary of State, rather than its being mailed by the trust itself.

New York City and numerous other municipalities nationwide sell their tax liens to trusts they create, which in turn sell bonds securitized by the tax liens and pay the proceeds to the municipalities, thereby converting their tax delinquencies into readily available cash. The court below ruled that such a trust is a private actor relieved of the due process responsibilities that the Fourteenth Amendment places on governmental bodies. If allowed to stand, this carves out an exception to *Jones* which will permit municipalities across the nation to nullify *Jones* by forming their own tax lien trusts free of governmental due process obligations. Furthermore, the court below held that such a trust may elect to evade

Jones by using a substituted method of serving notice of tax foreclosures under which the trust avoids finding out whether the certified mailing of the notice was returned to the sender unclaimed, and enjoys no duty to even ask if the mailing succeeded before foreclosing upon the property owner's default.

OPINION BELOW

The decision of the Appellate Division of the Supreme Court of the State of New York, First Department ("Appellate Division") (App. A), is reported at 44 A.D.3d 576, 845 N.Y.S.2d 235, 2007 N.Y. Slip Op. 08115 (1st Dep't 2007). This decision affirmed an unreported order of Supreme Court of the State of New York, County of New York (the trial court) filed September 22, 2005 (App. D) denying the motion of Petitioner 114 Tenth Avenue Assoc., Inc. ("114 Tenth") to vacate a Judgment of Foreclosure and Sale and foreclosure sale, and an unreported order of the trial court filed December 20, 2006 (App. C) denying 114 Tenth's motion for renewal of its vacatur motion.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.[1] 114 Tenth never received notice of this foreclosure proceeding and lost its land and building located at 114 Tenth Avenue, New York, New York (the "Property") in a foreclosure sale held without its

[1] 28 U.S.C. § 2403(b) does not apply because the New York Attorney General has been served as attorney for Respondent New York State Department of Taxation and Finance.

knowledge. When 114 Tenth learned of the sale from the winning bidder the day after it happened, it promptly obtained a stay of the closing of the sale pending its litigation to vacate the sale. The closing has remained stayed during the proceedings below,[2] with the most recent extension staying the closing through this Court's review. If this Court does not act, 114 Tenth will lose title to its property. As 114 Tenth is facing the immediate conveyance of its Property, the order below is considered final because "the controversy [has] proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic National Gas Co. v. Oklahoma*, 344 U.S. 62, 68 (1948); *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 126 (1945) ("a judgment directing immediate delivery of physical property is reviewable").[3]

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[2] The closing was also automatically stayed because 114 Tenth filed a chapter 11 bankruptcy petition on November 10, 2005 in the U.S. Bankruptcy Court for the Southern District of New York, *In re 114 Tenth Avenue Assoc., Inc.*, No. 05-60099(ALG), though this bankruptcy stay was lifted on February 8, 2006 to permit reargument and appeal.

[3] The decision below is final under 28 U.S.C. § 1257 despite there being further proceedings required to distribute the proceeds of sale, *see* New York Real Property Actions & Proceedings Law § 1362, because "[a]n order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow." *Republic*, 344 U.S. 68. The distribution proceedings will not affect finality because they will involve only state law issues. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975) (cases final despite remaining state courts proceedings, where "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings . . . [which] 'could not remotely give rise to a federal question.'" (quoting *Radio Station WOW*, 326 U.S. at 127)).

All avenues of further appeal within the New York court system have been exhausted. The New York Court of Appeals dismissed, *sua sponte*, 114 Tenth's appeal on state finality grounds (App. E), and on June 3, 2008 denied a timely motion for reconsideration of its *sua sponte* dismissal. (App. F).[4] 114 Tenth's motion in the Appellate Division for reargument or, in the alternative, discretionary appeal to the Court of Appeals was denied in a February 26, 2008 order. (App. B). Although the New York Court of Appeals considers this case non-final for its purposes, as this Court recognized in a case addressing a similar New York order, the question of whether a judgment is 'final' under 27 U.S.C. § 1257 is "purely a question of federal law," which is entirely different from the finality requirement for jurisdiction under the New York Constitution. *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963) (certiorari from Appellate Division decision would have been available after Court of Appeals finality dismissal had petitioner had sought discretionary appeal in Appellate Division). As such, this

[4] Although the Court of Appeals did not explain why it considered the Appellate Division order non-final, it appears that under the idiosyncratic Court of Appeals finality jurisprudence, a denial of a motion to vacate a final order (which the Judgment of Foreclosure and Sale is considered to be) is considered a non-final order. *Aponte v. Raychuk*, 78 N.Y.2d 992, 580 N.E.2d 758, 575 N.Y.S.2d 272 (1991) ("Appellate Division order, to the extent it affirms the denial of defendant's motion to vacate a default, is nonfinal and thus nonreviewable"); *Lincoln Savings Bank v. Warren*, 72 N.Y.2d 883, 528 N.E.2d 518, 532 N.Y.S.2d 366 (1988) (appeal of affirmance of denial of motion to vacate judgment of foreclosure and sale dismissed as non-final under N.Y. Const.); *see generally* Karger, Arthur, Powers of the New York Court of Appeals § 4:15 at 93-94 (rev. 3d ed. 2005).

Court has jurisdiction under 28 U.S.C. § 1257 over a final judgment "rendered by the highest court of a State in which a decision could be had."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the U.S. Constitution provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Statutory substituted service on the New York Secretary of State (the "Secretary") is authorized under the New York Business Corporations Law ("BCL"). The BCL provisions involved herein, BCL §§ 304(a), 306(b)(1) & 308, are set forth in relevant part in Appendix G.

Tax liens, tax lien sales, and tax lien foreclosures in the City of New York (the "City") are governed by the New York City Administrative Code (the "NYC Code"). The NYC Code provisions involved herein, NYC Code §§ 11-319(b)(2)(i), 11-332(a), 11-335, 11-340, & 11-347, are set forth in relevant part in Appendix H.

STATEMENT OF THE CASE

A. The Establishment and Operation of the Trust

Respondent NYCTL 1999-1 Trust (the "Trust"), is a trust created by New York City under a program in which the City conveys delinquent tax liens a series of trusts (the "NYCTL Trusts") as part of securitized transactions under which the City immediately receives

the proceeds of tax lien revenue bonds.[5] The City creates, owns, selects the trustee and custodian of, and is the residual beneficiary of each of the NYCTL Trusts in compliance with NYC Code § 11-319(b)(2)(i), which permits simplified negotiated sales to "a trust or other entity created by the city or in which the city has an ownership or residual interest."

The Trust at issue in this case issued bonds in the amount of $45 million after the City conveyed 2,632 liens with a total value of $48 million to the trust. This conveyance was documented by a Tax Lien Certificate dated June 20, 2002, with an amendment dated August 8, 2002, recorded in the City Register's land title records against each of the properties subject to the liens.[6]

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[5] A 2003 City Council Finance Committee report (included in the record below) describes the tax lien sale process as follows:

> The tax lien sales under the new procedures have all been securitized transactions in which a single purpose Trust is established. This Trust issues bonds to institutional investors collateralized by the delinquent tax liens and surcharge liens. The money raised by the issuance of the bonds (as well as a subordina ted note issued by the Trust) is then used to acquire a portfolio of tax liens which include City of New York liens (property tax liens), Water Board liens and Business Improvement District liens. The City, the Water Board and the Business Improvement Districts retain a residual interest in the Trust.

[6] The June 20, 2002 Tax Lien Certificate conveyed the Trust "all of the City's right, title and interest in and to all real (Cont'd)

Among those 2,632 liens was a lien against 114 Tenth's real property in the amount of $18,812.42.

Although tax liens are purportedly conveyed to the NYCTL Trusts, under the NYC Code, the City retains substantial control and involvement in the management and oversight of the liens and the NYCTL Trusts themselves. Also, NYC Code § 11-332(a) provides, in full, that: "Any purchaser of a tax lien or tax liens shall stand in the same position as the city and shall have all of the rights and remedies that the city would have had if the tax lien or tax liens had not been sold." *See also In re Mill Creek Phase 1 Staten Island Bluebelt System*, 10 N.Y.3d 898, 2008 N.Y. Slip Op. 05304, 2008 WL 2338631 at *1, (June 10, 2008) (NYCTL Trust "stands in the shoes of, and has the same rights as, the City"). The NYC Code further provides that the City's chief attorney, the Corporation Counsel, has the right at any time to assume representation of any purchaser of a tax lien, a right which was exercised here. NYC Code § 11-347.

Notwithstanding the NYC Code provision requiring the Trust to stand in the shoes of the City, when the City conveys the tax liens to the Trust, the delinquencies the liens represent are no longer recorded on the City's books. As a result, when 114 Tenth obtained its post-lien sale tax balance due from the City and paid that full

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(Cont'd)

property taxes, ... and other City charges that have prior to the date hereof become a lien" (i.e. are past due). (The August 8, 2002 Amendment modified this language, but not in a manner relevant to the present case.)

outstanding balance, the balance did not include the amount of the delinquency conveyed to the Trust by the tax lien sale.[7] Additionally, the City apparently never informed the Trust (supposedly standing in its shoes) that 114 Tenth was continuing to pay its property taxes during the time the Trust was prosecuting this tax foreclosure action. Whatever administrative convenience this may offer to the Trust and the City, to the extent that this insulation of information acts to deprive the Trust of unique information posed by the City about its tax debtors, it is another mechanism whereby the City evades *Jones*.

B. The Trust's Service Upon 114 Tenth

On May 20, 2003, the Trust commenced the tax lien foreclosure action here, listing Petitioner's actual business address (and the address of the Property), 114 Tenth Avenue, New York, New York on the face of the summons. Despite the Trust's having 114 Tenth's actual address, at which it could have effected personal service, the Trust elected to serve 114 Tenth through substituted service upon the New York Secretary of State under BCL § 306(b). By selecting this service option from the many alternatives available under New York law, the Trust chose the sole method of service

[7] On February 10, 2003, 114 Tenth's president went to the City's tax offices, requested his tax balance and paid what he was told. Although 114 Tenth believed it had fully satisfied its tax obligations, the City's policy of writing off tax delinquencies conveyed to NYCTL Trusts meant that it never learned of the balance due the Trust, which it was then willing and able to pay. Thereafter, 114 Tenth continued to make tax payments in ignorance of the pendency of this foreclosure proceeding.

under which notice would be sent by certified mail but the Trust was guaranteed not to learn whether the certified mailing was successful without affirmative inquiry on its part.

As required by BCL § 306(b), the Secretary sent a certified mailing to the address of 114 Tenth on its records. However, the certified mailing was returned marked "unclaimed" because the address on the Secretary's records was outdated, and the Secretary duly recorded the return of the "unclaimed" mailing in departmental records under BCL § 308. However, the Secretary was not required under the BCL or any other law to inform the Trust that 114 Tenth failed to receive actual notice of this foreclosure action. Even though 114 Tenth failed to appear in this action while simultaneously continuing to pay property taxes, the Trust never inquired whether the certified mailing was delivered to 114 Tenth. The Trust proceeded to prosecute the foreclosure on 114 Tenth's default without any further effort to contact 114 Tenth for the nearly two years between the commencement of the case and the March 1, 2005 entry of the Judgment of Foreclosure and Sale. Indeed, the Trust simply disregarded an express direction in the trial court's Amended Order of Reference that "a copy of this Order . . . shall be served upon the owner of the equity of redemption" (i.e., 114 Tenth).[8] Though the Trust's noncompliance was

[8] The foreclosure judgment had a similar provision with which the Trust ineffectually complied by making a mailing to an incomplete address that 114 Tenth never received. *See New York Housing Authority v. Fountain*, 172 Misc.2d 784, 787, 660 N.Y.S.2d 247, 250 (N.Y.C. Civ. Ct. 1997) (service omitting ZIP (Cont'd)

repeatedly pointed out in 114 Tenth's papers in the state court proceedings, no court below expressly addressed the Trust's blatant failure to provide court-ordered notice.

114 Tenth did not receive actual notice of the foreclosure proceedings until after the court-appointed referee held a May 18, 2005 public foreclosure auction sale that was won with a bid of $2 million, against the Trust's tax lien certificate in the amount of $18,812.42. An appraisal of the Property shortly thereafter valued it at $3.2 million.

C. Proceedings After 114 Tenth Learned of the Foreclosure

The day after the referee's sale, 114 Tenth learned of the proceedings from a tenant who met an agent of the winning bidder who was investigating the Property. Eight days later, 114 Tenth made an emergency motion by order to show cause seeking to vacate the Judgment of Foreclosure and Sale and the referee's foreclosure sale on the grounds, *inter alia*, that 114 Tenth had never received notice of the foreclosure proceedings and was thus "deprived of their property without due process." The trial court denied (App. D) this emergency motion, rejecting 114 Tenth's due process argument by citing a New York case, *Raschel v. Rish*, 69 N.Y.2d 694, 697, 504

(Cont'd)

code not "reasonably calculated to inform the [defendants] of the proceedings"); U.S Postal Service, Domestic Mail Manual § 602.1.4.2 (July 3, 2008) (complete address must include "Correct 5-digit ZIP Code or ZIP+4 code").

N.E.2d 389, 512 N.Y.S.2d 22 (1986), which analyzed service requirements under the federal standard set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

On May 4, 2006, 114 Tenth moved for renewal of the trial court's order denying vacatur based, *inter alia*, on the due process analysis in *Jones*, which had been decided by this Court eight days previously. This motion was denied (App. C), with a detailed analysis of the service under *Jones*.

After a timely appeal, the Appellate Division affirmed both the trial court's vacatur and the renewal orders in a single order (App. A) the order upon which certiorari review is sought in this Court. In this order, the Appellate Division purported to distinguish *Jones* and, for the first time in these proceedings, ruled – without citing any authority – that the Trust was to be treated as a private actor. In both the trial court and on appeal, 114 Tenth had preemptively argued that because the City was so intertwined with the creation and operation of the Trust, its nominally private nature would not relieve it of its governmental actor responsibilities, and no opposing party countered with any legal authority to suggest that the Trust should be treated as a private actor.

As detailed in the Statement of Jurisdiction above, 114 Tenth exhausted all avenues for further state court review. Although 114 argued at each stage for the reversal of the Appellate Division's rulings on the constitutionality of service and the Trust's private actor status (and no opposing party ever argued that the

private actor ruling was correct), each subsequent decision was a summary denial of reconsideration or further review, not addressing the substance of the arguments. (Apps. B, E & F).

REASONS FOR GRANTING THE PETITION

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW ERRED IN FINDING THAT THE TRUST WAS A PRIVATE ACTOR NOT BOUND BY FOURTEENTH AMENDMENT OBLIGATIONS

The petition should be granted because the decision below, which held that the Trust was a "private actor," is contrary to this Court's established precedent that governments may not avoid their Fourteenth Amendment state actor obligations by operating through ostensibly private entities that they establish. Disregarding the relevant decisions of this Court, the Appellate Division held – without citing any authority – that the present case was distinguishable from *Jones* in that the Trust was considered a non-governmental actor:

> The instant circumstances are readily distinguishable from *Jones*, which concerned the sufficiency of notice provided to an individual by a state government of a tax delinquency and of an impending tax sale of

> the individual's property, whereas here, process was served by a private actor upon 114 Tenth Avenue. (App. A at 2a-3a)

Through this ruling, the Appellate Division has opened the door to a glaring loophole in *Jones* through which a municipality may evade the Fourteenth Amendment to deprive its property owners of due process by simply transferring its tax liens to a trust that it creates. This loophole poses a substantial risk to property owners situated in the many jurisdictions that already participate in the securitization of tax liens through tax lien trusts, as well as in those jurisdictions that may establish tax lien trusts to minimize their notice obligations in reliance on the decision below.

This Court has long held that that a government cannot evade its constitutional obligations by simply resorting to a corporate or trust form. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *Evans v. Newton*, 382 U.S. 296, 298 (1966). State action is attributed to ostensibly private entities when "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Under *Brentwood*, several factors are considered in establishing that a nominally private entity must be treated as a state actor, including: the source of authority for the supposedly private action, the control of a nominally private entity by an agency of the state, "when it is entwined with governmental policies or when gove nment is entwined

in its management or control" and the delegation of a public function to a nominally private entity. 531 U.S. at 288-89, 296; *see also Evans*, 382 U.S. at 298 ("When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations").

In the instant case, the City established the Trust under a City program, implemented under the City's local laws, in which the City sold tax liens to the City-established Trust as collateral for bonds, the proceeds of which the City received for its immediate use. The City is the grantor of the Trust, is the owner of the Trust under its trust declaration, has selected the trustee and custodian, is entitled to represent the Trust at law and is the residuary beneficiary of the Trust, entitled to all proceeds available after the bondholders are paid. Furthermore, the City established a continuing tie to the tax liens "sold" to the Trust in that the Trust "shall stand in the same position as the city" with respect to the tax liens and "have all the rights and remedies that the city would have had if the tax lien or tax liens had not been sold." NYC Code § 11-332(a); *In re Mill Creek Phase 1*, 2008 WL 2338631 at *1. Moreover, in delegating the very public function of tax collection to the Trust, the constitutional obligations the City and the Trust owe to property owners are "certainly not dissipated *ipso facto* by the appointment of 'private' trustees." *Evans*, 382 U.S. at 301. As such, the Trust satisfies the *Brentwood* test, 531 U.S. at 296, and therefore should be considered a state actor in spite of its nominally private status.

Although this case deals with New York City procedures, the implications of this decision reach well beyond the eight million citizens of New York. If the Appellate Division private actor holding is allowed to stand, property owners anywhere in the United States face the risk of losing their due process rights whenever an ostensibly private tax lien trust initiates a foreclosure action. Currently, 28 states, the District of Columbia, Puerto Rico and the Virgin Islands have enabling legislation authorizing their local governments to sell tax liens for unpaid real estate tax bills,[9] and five jurisdictions have authorized "private" tax lien trusts: Connecticut, the District of Columbia, New Jersey, New York City, and Philadelphia.[10] If the holding of the Appellate Division were adopted in any of these other jurisdictions, governments there could easily duck their Fourteenth Amendment obligations to provide due process in tax foreclosures by simply conveying their tax liens to "private" trusts they set up. As such, certiorari should be granted to confirm that private tax

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[9] These 28 states are: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Montana, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. For a discussion of the more than 150 different systems used for enforcing property tax collections across the U.S., *see* Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747 (2000).

[10] Additionally, bulk sales of tax liens are permitted in Waterbury, Connecticut, Fulton County, Georgia and the following counties in Ohio: Cuyahoga, Franklin, Lucas, Montgomery and Summit.

lien trusts are indeed public actors subject to the constraints of the Constitution, as construed by *Jones*, and to prevent other jurisdictions from denying their property owners due process by following the New York precedent below.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING PROPER NOTICE OF THE FORECLOSURE ACTION

Certiorari is proper here because the Appellate Division's decision conflicts sharply with this Court's due process holdings applicable to tax foreclosures and as a result deprives 114 Tenth of its Fourteenth Amendment right not to have its Property taken without due process. Further, certiorari should be granted because the Appellate Division has decided this important federal Constitutional question in a way that conflicts with the decisions of other state courts of last resort and United States Courts of Appeal. Recognizing that tax foreclosure represents "extraordinary power against a property-owner – taking and selling a house he owns," *Jones*, 547 U.S. at 239, this Court has held that the Fourteenth Amendment protects property owners by requiring notice and an opportunity to a hearing appropriate to the nature of the case. *Jones*, 547 U.S. at 234; *Mullane*, 339 U.S. at 313. Furthermore, this Court has "required the government to consider unique information about an intended recipient regardless of

whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230.

In providing notice of the foreclosure here, the Trust elected to use substituted service on the Secretary of State, a procedure which, as applied in New York and in the majority of other states, causes a certified or registered mailing to be sent to a defendant but gives the plaintiff no information regarding whether the mailing is returned undelivered unless the plaintiff makes a specific inquiry. By electing to use such a procedure without making any further inquiry, the Trust knowingly blinded itself to the readily available information that 114 Tenth did not receive notice. Moreover, it is well-known to New York practitioners that the substituted service statute the Trust elected to use here, BCL § 306(b), commonly results in the failure of actual notice, so its use by the Trust without any further attempts to discern whether notice was in fact received is a particularly egregious violation of *Mullane*'s requirement that one act as "one desirous of actually informing the absentee." 339 U.S. at 315. The decision below permitting such service conflicts both with this Court's precedent and decisions around the country which hold that, under *Jones*, mere statutory compliance is insufficient where available information shows that such statutory compliance fails to provide actual notice.

A. New York and the Majority of States Permit Substituted Service on a State Official Where the Official Mails Notice but Does Not Inform the Plaintiff When the Official Learns the Defendant Did Not Receive the Mailing

The due process issues here occurred because the Trust elected not to serve 114 Tenth personally, choosing instead to effect substituted service by serving the corporation through the New York Secretary of State.[11] In addition to New York, 33 states and the District of Columbia[12] permit substituted service by delivery of process to the state's Secretary of State or other designated official ("Substituted Secretary Service"), where the state official is designated by statute as an "agent" of the corporation for the purpose of receipt of the process. However, this Court has recognized that such an "agency" by statutory fiat differs from an actual, consensual agency in a due process analysis. *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928) (rejecting service on Secretary of State as statutory "agent"); *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 703 (1988) (affirming service on subsidiary found to be actual agent, in contrast to "the deposit of documents with a designated local official [who] generally is supposed to transmit the documents");

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[11] The procedural rules of each state permits plaintiffs to effect personal service upon a corporation, usually by delivery of process to an officer or agent of the corporation. *Cf.* Fed. R. Civ. P. 4(h)(1) (service "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent").

[12] To simplify this discussion, hereafter the District of Columbia will be considered and counted as a state.

see also Restatement (Second) of Agency, § 1, cmt f. (1958) ("Although such a statute may label the public official an "agent" for receiving service of process, he is not an agent in the sense used herein. He is not in fact designated by the one on whose account he 'accepts service', nor does he respond to that person's directions"); *Leighton v. Roper*, 300 N.Y. 434, 442, 91 N.E.2d 876, 881 (1950) ("an agency created, not for the benefit of the principal, but for the benefit of third persons, . . . as well as the State").

Of the states permitting Substituted Secretary Service, 29 follow a procedure like the New York procedure used here, in which the plaintiff delivers copies of the process to the official, and the official sends a copy of the process to the defendant by certified or registered mail at an address on file or provided by the plaintiff.[13] Under the law of each of these states, with one exception, the official will learn if the mailing is returned undelivered, but will not inform the plaintiff of the non-delivery unless the plaintiff specifically inquires.[14] Where a foreclosing authority elects to use

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[13] In six states, the plaintiff is required to file a copy of the process in the office of the state official and to separately send a copy to the defendant by certified or registered mail. Under this scheme, the official merely acts as a depository for the process and the plaintiff will be informed of any non-delivery of the process, because the plaintiff's mailing will be returned directly to him or her. (In New York the Secretary of State mails process directly to domestic and authorized foreign corporations, while unauthorized foreign corporations are served by the deposit method described in this footnote. BCL § 307).

[14] Montana has a unique provision under which the Secretary of State is required send an affidavit of the (Cont'd)

Substituted Secretary Service to provide notice of in any of these states,[15] the foreclosing authority does not learn whether the mailing of the notice is returned undelivered, and thus it can avoid its obligation under *Jones* to act further to get notice into the property owner's hands. Of the five jurisdictions that permit sales to tax lien trusts, four of them, Connecticut, the District of Columbia, New Jersey and New York, have Substituted Secretary Service which provides no notice if the official's mailing is not delivered.

As such, unless this Court finds that foreclosing authorities have a duty of reasonable inquiry about the actual results of Substituted Secretary Service mailing, permitting such Service will provide a vector by which the notice requirements of *Jones* may be evaded in the majority of states.

(Cont'd)
circumstances of the mailing to the plaintiff's attorney. Mont. R. Civ. P 4(D)(6). In all other states, the official either does nothing or provides a report on the service to the court clerk, but not the plaintiff.

[15] New York and West Virginia permit plaintiffs to freely elect Substituted Secretary Service without prerequisite. In all other states, Substituted Secretary Service is subject to certain conditions, typically failure to appoint or unavailability of a registered agent or inability to effect personal service.

B. New York BCL § 306(b), Without Any Other Efforts To Give Notice, Does Not Provide Reasonable Notice To Property Owners in Tax Foreclosures

In prosecuting this tax foreclosure action, the Trust elected to serve 114 Tenth by making substituted service on the New York Secretary of State under BCL § 306(b) without inquiring whether the Secretary's mailing was delivered, and to take no further steps to notify 114 Tenth of the commencement or pendency of the foreclosure prior to judgment (even ignoring a trial court order to serve 114 Tenth with an interlocutory order). Although the Trust undertook the minimum efforts required by the statute to provide notice, it cannot claim to have taken efforts "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *Mullane*, 339 U.S. at 315, particularly in light of the well known deficiencies of BCL § 306(b) service and the absence of any measures to mitigate such deficiencies in tax foreclosure actions. *See Greene v. Lindsey*, 456 U.S. 444, 454 (1982) (no due process where method "not infrequently" failed to provide actual notice). As such, the notice given was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them of an opportunity to present their objections." *Mullane*, 339 U.S. at 314.[16]

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[16] In *Jones* this Court explained that "the constitutionality of a particular procedure for notice is assessed *ex ante*", and not based on the results of any particular case. 547 U.S. at 231. The analysis here is based on a *ex ante* review of how the procedures used – and the safeguards not used – are not reasonable under the circumstances, not a *post hoc* review of the failure of notice in this particular situation.

New York is a state that permits Substituted Secretary Service upon domestic and authorized foreign corporations via transmission of the process by the Secretary to the defendant by certified mail, return receipt requested. BCL § 306(b). The Secretary keeps records of the results of the service, BCL § 308, but does not inform the plaintiff whether a mailing is returned. Plaintiffs may, however, make a simple, free inquiry of the Secretary's office to find out all of the details of the service, including whether and why the mailing was returned undelivered.[17] (Had the Trust inquired, as someone interested in actually providing notice would have, it would have learned that the Secretary's mailing here was returned "unclaimed," the same as the mailing returned in *Jones*.)

Under BCL § 306(b)(1): "Service of process on such corporation shall be complete when the secretary of state is so served." New York courts hold that service on the Secretary is complete and valid "irrespective of whether the process subsequently reached defendant," and even when non-delivery is due to the Secretary's own error. *Spearman v. Atreet Corp.*, 238 A.D.2d 194, 656 N.Y.S.2d 30 (1st Dep't 1997); *Micarelli v. Regal Apparel, Ltd.*, 52 A.D.2d 524, 381 N.Y.S.2d 511 (1st Dep't 1976) (good service when Secretary did not mail process at all); *NYCTL 1998-1 Trust v. Oneg Shabbos Inc.*,

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[17] As set forth in the record below, the New York Department of State has a policy of responding to telephone or written public inquires free of charge, providing all of the information it keeps on service of process, including whether and when the certified mailing was delivered or, if it was returned, the post office notation regarding the reason for return.

8 Misc. 3d 645, 646 n.1, 800 N.Y.S.2d 808, 809 n.1 (Sup. Ct. 2005) (no defect in service when process mailed to erroneous address), *modified on other grounds*, 37 A.D.3d 789, 830 N.Y.S.2d 763 (2d Dep't 2007).[18] It is well known to New York litigators that service under BCL § 306(b) will frequently result in a corporation's not actually receiving notice of the process served.[19] Professor David D. Siegel, New York's leading commentator on state civil practice, has noted that under BCL § 306(b) service: "Often a default results because the mailed copy doesn't reach the corporation . . . for the reason that the corporation failed to record a proper change of address on the secretary's records." Siegel, David D., Practice Commentaries to N.Y. Civil Practice Law & Rules ("CPLR") 5015, C5015:6 (McKinney's 2007). Indeed, New York courts have repeatedly recognized that plaintiffs have often "chose[n] to make service on the Secretary of State knowing that such service . . . was calculated to, and in fact did, avoid actual notice of this action until after judgment was entered." *Mintz v. Astoria Holding Corp.*, 56 A.D.2d 595, 596, 391 N.Y.S.2d 650, 650 (2d Dep't 1977)

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[18] As discussed above, New York's statutory designation of the Secretary as "agent" under BCL § 304(a) does not render the Secretary an actual agent for due process purposes. *Wuchter*, 276 U.S. at 24 (1928); *Volkswagenwerk*, 486 U.S. at 703 (1988); Restatement (Second) of Agency, § 1, cmt f. (1958).

[19] Indeed, Plaintiff must be aware of this frequent result, as sister NYCTL Trusts have faced claims that corporate property owners did not receive process served on the Secretary of State. *See NYCTL-1 Trust v. Liberty Bay Realty Corp.*, 21 A.D.3d 1013, 801 N.Y.S.2d 346 (2d Dep't 2005); *Oneg Shabbos Inc.*, 8 Misc. 3d at 646 n.1, 800 N.Y.S.2d at 809 n.1.

(reversing denial of motion to vacate where plaintiff was aware of whereabouts of defendant corporation); *see also Stein v. A. Matarasso & Co.*, 143 A.D.2d 825, 826, 533 N.Y.S.2d 126, 127 (2d Dep't 1988) (plaintiff "had knowledge of the defendant's actual business address [and thus] could have effectuated service under CPLR 311 [personal service upon corporation]"). Indeed, because the service address the Secretary will use for mailing to each corporation is readily available on the internet,[20] it can be easy for a plaintiff seeking to avoid actual notice to determine if BCL § 306(b) service is likely to result in non-delivery.[21]

Given the well-known propensity of BCL § 306(b) service to fail to provide actual notice, the Appellate Division's refusal to vacate this tax foreclosure caused by an obsolete address on file with the Secretary (App. A at 2a) conflicts with *Jones*, which rejected the contention that a person's "failure to comply with a statutory obligation to keep his address updated forfeits

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[20] Further, because BCL § 306(b) service is only permitted on domestic or authorized foreign corporations, plaintiff's counsel will typically make an inquiry prior to service either by telephone or the internet as to whether such service is permitted. Cf. BCL § 307 (separate procedure for service on unauthorized foreign corporations). An internet inquiry will automatically list the Secretary's service address, and the Secretary's office will provide such information upon request in a telephone inquiry.

[21] Indeed, the Trust has an incentive to delay notice – and the potential for redemption – because the tax liens it holds earn it 18% interest, well above what it must pay on its bonds. *In re Mill Creek Phase 1*, 2008 WL 2338631 at *1.

his right to constitutionally sufficient notice." 547 U.S. at 232; *see also Robinson v. Hanrahan*, 409 U.S. 38 (1972) (notice served on an address maintained with Secretary of State insufficient when plaintiff knows address is incorrect).[22] Likewise, the Appellate Division's requirement of a meritorious defense (App. A at 2a) conflicts with *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), which established that where notice is defective, due process prohibits requiring a meritorious defense as a condition to vacating a default. *Peralta* rejected the argument that "without a defense, the same judgment would again be entered on retrial and hence [the defendant] had suffered no harm," instead observing that if the defendant "had notice of the suit, he might have . . . worked out a settlement or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than to suffer it to be sold at a constable's auction." *Id.* at 85. This observation is particularly apt here, because 114 Tenth would have undoubtedly redeemed the property (appraised at than $3.2 million), for the judgment amount (including interest) of approximately $27,000, rather

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[22] The deficiencies in BCL § 306(b) service are particularly harsh in foreclosure actions because New York courts hold that once the hammer falls in a foreclosure sale, they are without discretion to set the sale aside, absent "fraud, collusion, mistake, or misconduct" or pre-sale redemption. *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 763 N.Y.S.2d 836 (2 Dept. 2003) (refusing to set aside sale when pre-sale payment was made to trust directly, rather than into court).; *Oneg Shabbos Inc.*, 8 Misc. 3d at 646, 800 N.Y.S.2d at 809 (notice sent to incorrect address).

than facing the depressed price of a public auction, here merely $2.0 million.[23]

Here, the Trust elected to effect service through the Secretary under BCL § 306(b), a procedure which conceals whether notice was actually received, to not ask the Secretary's office if the notice was delivered, and to take no other measures to provide notice to 114 Tenth. The Trust's failure to make a simple, free inquiry regarding whether 114 Tenth actually received notice was particularly unreasonable since 114 Tenth had continued to pay its taxes to the City, something the Trust should be held to be on notice of as alter ego of the City under NYC Code § 11-332(a). Accordingly, the process the Trust used was unreasonable and deficient as it was neither "reasonably calculated, under all the circumstances, to apprise" 114 Tenth of the impending foreclosure nor was it means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish" notice to 114 Tenth. *Mullane*, 339 U.S. at 314-15.

C. Since the Trust Elected to Provide Notice Through a Government Official, The Trust Is Responsible for the Actions of the Official

Had the Trust served 114 Tenth by a private process server, it unquestionably would be held responsible for the actions of the process server and charged with the

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[23] Indeed, if the foreclosure sale is vacated here, 114 Tenth intends to promptly pay all outstanding taxes and other charges, which will satisfy the interests of City and the Trust in tax collection while preserving its substantial value in its real property.

knowledge the process server gained while attempting to effect service. Here, the Trust claims it can avoid responsibility for whether there was real notice by electing not to use its own process server, but rather asking a government official, the New York Secretary of State, to provide the notice, and then never inquiring whether service succeeded. Due process requires, however, that the Trust not be permitted simply to disregard the Secretary's actual knowledge that service failed. Instead, a party, particularly a governmental actor, serving notice through a governmental official must be charged with the official's actual knowledge that service failed.

In *Jones*, this Court used the vivid example of a postman dropping notice letters down a storm drain to illustrate when additional notice is required "despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." 547 U.S. at 229. Although this example is fanciful, it points out that a party is not absolved from its duty to provide due process by handing off notice for delivery by an ostensibly responsible governmental actor.

Cases applying *Jones* likewise hold that where a foreclosing party delegates responsibility for providing notice to a government official or agency, the foreclosing party is responsible for the acts of the delegate. In *Thompson-Green v. Estate of Drobish*, 142 P.3d 897, 2006 WY 126 (Wyo. 2006), a tax deed purchaser attempted to serve the property's co-owners through a sheriff's deputy, who personally served one co-owner, who claimed to also accept service the other co-owners.

However, the deputy did not make a required search for whether any of the other co-owners were county residents whom he would be required to personally serve. 142 P.3d at 901. Although the tax deed purchaser claimed "that she took 'all reasonable steps available to her to comply with the requirements of the statute,'" *Id.* at 900, the Wyoming Supreme Court found the deputy's deficient search rendered the service invalid under *Jones*. *Id.* at 901-03; *see also Wilson v. Blount County*, 207 S.W.3d 741, 748-51 (Tenn. 2006) (42 U.S.C. § 1983 due process violation claim upheld against county under *Mullane* and *Jones* where county gave sheriff's department a tax foreclosure summons to serve, and sheriff's officer issued return saying diligent search for owner had been undertaken, when only cursory search had been performed); *cf. Tayor v. Westly*, 488 F.3d 1197, 1201 (9th Cir. 2007) (where state controller sought to acquire property by escheatment, controller could not rely on notices sent by corporations, banks and other entities which turned property over for escheatment, finding "no authority for the proposition that reliance that the likelihood that a *third party* will give notice is 'constitutionally adequate'" and that such third party reliance is foreclosed by *Jones*).

Indeed, even before *Jones* it was recognized that due process charges delegating agencies with the knowledge acquired by their delegates. In *U.S. v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (en banc), the DEA mailed a notice of forfeiture to a pretrial detainee, care of the U.S. Marshals Service. The majority held that due process required that the DEA mail the notice directly to the detainee, finding no authority "that suggests that the forfeiting agency may delegate its

responsibility by mailing notice to the Marshals Service in Pittsburgh when the forfeiting agency is aware the intended recipient is confined elsewhere." *Id.* at 672. In dissent, then-Circuit Judge Alito wrote that due process would have been satisfied by the DEA's mailing the notice to the Marshals Service, but only if a remand determined that the Marshals Service actually forwarded the notice to the detainee where he was housed. *Id.* at 675-76 (Alito, J., dissenting). Under either view, the forfeiting agency could not avoid responsibility for the notice actually being sent to the detainee, either because, under the majority view, delegation was prohibited, or because, under the dissent, the forfeiting agency would be held responsible for the actions (or inactions) of the agency to which the service was delegated.

Electing to give notice of this tax forfeiture through the Secretary of State does not absolve the Trust of its due process responsibilities to act as though it were desirous of actually informing 114 Tenth of this proceeding. *Mullane*, 339 U.S. at 315. Though the Trust may undoubtedly hand off the task of undertaking the certified mailing of notice to the Secretary, doing so cannot absolve the Trust from its non-delegable responsibility to ensure that the entire notice procedure provides due process under *Mullane* and *Jones*.

D. The Decision Below Conflicts with the Holdings of Other State and Federal Courts, Which Do Not Permit Mere Statutory Compliance To Excuse Further Notice Warranted Under the Circumstances

In blindly accepting the constitutionality of BCL § 306(b) service without considering unique circumstances, the Appellate Division's decision conflicts with how state courts of last resort and federal circuit courts have applied *Jones*. These other courts routinely review the circumstances of notice for due process even where all statutory formalities have been satisfied. For instance, the First Circuit held in a forfeiture case that, although the government complied with all statutory requirements for notice, "when the government knows or easily can ascertain the identity and whereabouts of a potential claimant, reasonableness requires the government, at a minimum, to take easily available steps in its attempt to notify the claimant." *U.S. v. One Star Class Sloop Sailboat*, 458 F.3d 16, 23 (1st Cir. 2006).

Several state supreme courts have applied this directly to tax foreclosures, finding due process to be lacking despite strict statutory compliance. The Supreme Court of Michigan held that a statute that limited the circuit court's jurisdiction to modify foreclosure judgments to be invalid and unconstitutional as applied to property owners who did not receive constitutionally adequate notice. *In re Treasurer of Wayne County for Foreclosure*, 478 Mich. 1, 10, 732 N.W.2d 458, 462-63 (2007); *see also Sidun v. Wayne County Treasurer*, 481 Mich. 503, 511, 751 N.W.2d 453,

459 (2008) ("even if a statutory scheme is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" (quoting *Jones*, 547 U.S. at 230)); *Vosilla v. Rosado*, 944 So.2d 289 (Fla. 2006) (holding foreclosure notice sent in compliance with statutory notice requirements violated due process where owners had provided taxing authority with a change of address); *Wilson*, 207 S.W.3d at 750 ("when the party's name and address are 'reasonably ascertainable,' constructive notice alone is not constitutionally adequate." (quoting *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983)).

In direct contrast to these circuit and state supreme court decisions requiring more than blind statutory compliance, the Appellate Division unquestioningly upheld BCL § 306(b) service, finding no "reason to believe that such service is unconstitutional." (App. A, 2a-3a). Had the Appellate Division analyzed the actual circumstances of this particular service, it would have found that the information available to the Trust required it to take additional reasonable steps to inform 114 Tenth of the proceedings.

E. By Failing to Provide Further Notice Here, the Trust Denied 114 Tenth The Due Process Required by the Fourteenth Amendment

Because of the widely recognized problems of BCL § 306(b) service, problems shared at least in part with the Substituted Secretary Service of most states, the Trust was under a duty to inquire of the Secretary of

State whether notice had actually been received by 114 Tenth or if it had been returned, particularly where the Trust should have known – standing in the shoes of the City – that 114 Tenth was continuing to pay taxes. In upholding the Trust's conduct, the Appellate Division ignored the teachings of *Mullane* and *Jones* and denied 114 Tenth the due process to which it is entitled under the Fourteenth Amendment.

Although the decision below directly affects only New York City's tax collection procedures, because such procedures are likely to be used as a model for other states and municipalities that wish to obtain the immediate financial benefits available from securitizing their tax liens, it is important that this Court review and reverse the Appellate Division decision below so that taxpayers everywhere will not have their property taken without notice sufficient to satisfy the requisites of due process.

CONCLUSION

For the foregoing reasons, Petitioner 114 Tenth Avenue Assoc., Inc. respectfully requests that this Court grant this petition for a writ of certiorari to review the Appellate Division decision below.

Respectfully submitted,

ADAM LEITMAN BAILEY
Counsel of Record
WILLIAM J. GELLER
JESSICA SCHERER
DOV TREIMAN
ADAM LEITMAN BAILEY, P.C.
120 Broadway, 17th Floor
New York, New York 10271
(212) 825-0365

DONALD R. DINAN
ROETZEL & ANDRESS
1300 Eye Street, N.W., Suite 400 East
Washington, D.C. 20005
(202) 625-0600

JOEL M. SHAFFERMAN
THE LAW OFFICES OF
JOEL SHAFFERMAN, LLC
350 Fifth Avenue, Suite 2723
New York, New York 10118
(212) 509-1802

Counsel for Petitioner

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT ENTERED OCTOBER 30, 2007

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

1865-1866N

Index 109239/03

NYCTL 1999-1 Trust, et al.,

Plaintiffs-Respondents,

-against-

114 Tenth Avenue Assoc., Inc.,

Defendant-Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered September 22, 2005, which, to the extent appealed from, denied the motion of defendant 114 Tenth Avenue Assoc., Inc. (114 Tenth Avenue) to vacate the judgment of foreclosure and sale and to set aside the resulting foreclosure sale, and order, same

court and Justice, entered December 20, 2006, which denied 114 Tenth Avenue's motion to renew, unanimously affirmed, without costs.

The court properly denied 114 Tenth Avenue's motion to vacate the judgment of foreclosure and sale. The record establishes that 114 Tenth Avenue was properly served with notice of plaintiffs' foreclosure action in accordance with Business Corporation Law § 306, and the failure of 114 Tenth Avenue to receive service of process due to its breach of its responsibility to keep a current address on file with the Secretary of State does not constitute a reasonable excuse to vacate the judgment (*Cedeno v. Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 (1994), *lv dismissed* 84 NY2d 978 [1994]). 114 Tenth Avenue also otherwise failed to set forth a meritorious defense to the action.

Denial of the motion to renew was appropriate because contrary to 114 Tenth Avenue's position, *Jones v. Flowers* (547 US 220 [2006]), decided after submission of the original motion, did not constitute a change in the law that would alter the court's prior determination (CPLR 2221[e][2]). The instant circumstances are readily distinguishable from *Jones*, which concerned the sufficiency of notice provided to an individual by a state government of a tax deliquency and of an impending tax sale of the individual's property, whereas here, process was served by a private actor upon 114 Tenth Avenue pursuant to Business Corporation Law § 306. The holding in *Jones* does not address the constitutionality of service of process on the Secretary

of State as the designated agent of a corporation, nor is there any reason to believe that such service is unconstitutional. Furthermore, the new facts submitted by 114 Tenth Avenue in support of its motion to renew were readily available at the time the prior motion was made and 114 Tenth Avenue failed to provide a reasonable justification for failing to present these facts in support of its initial motion (CPLR 2221[e][3]; *Chelsea Piers Mgt. v. Forest Elec. Corp.*, 281 AD2d 252 [2001]).

We have considered 114 Tenth Avenue's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 30, 2007

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CLERK

APPENDIX B — ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED FEBRUARY 26, 2008

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 26, 2008.

Present: Hon. Jonathan Lippman, Presiding Justice,
Richard T. Andrias
Milton L. Williams
John T. Buckley,
E. Michael Kavanagh, Justices.

M-6329
Index No. 109239/03

NYCTL 1999-1 Trust, et al.,

Plaintiffs-Respondents,

-against-

114 Tenth Avenue Assoc., Inc.,

Defendant-Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix B

Defendant-appellant having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on October 30, 2007 (Appeal Nos. 1865-1866N),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

s/ [illegible]
Clerk

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: PART 51 FILED DECEMBER 20, 2006

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 51

Index No. 109239/03

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK, as collateral Agent and Custodian for the NYCTL 1999-1 TRUST,

Plaintiffs,

-against-

114 TENTH AVENUE ASSOC., et al.,

Defendants.

DECISION AND ORDER

SARALEE EVANS, J.S.C.

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this motion by defendant 114 Tenth Avenue Assoc. to renew its motion to vacate the judgment of foreclosure.

Amended Notice of Motion to
Renew, Affirmation & Exhibits.....1

Appendix C

Affirmation in Opposition to Renewal (Carlton) 2
Affirmation in Opposition to Renewal (Corp Counsel) 3
Affirmation in Opposition to Renewal (Donadio) 4

Defendant seeks to renew its' vacatur motion, asserting that the issue should be revisited in light of new and controlling law and additional relevant facts that were not available to it at the time of its emergency application. A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." To the extent that new facts are offered, movant must further demonstrate that they are such that they were unavailable in the first instance.

Prior Proceedings

Defendant 114 Tenth Avenue Associates has owned the building at 457 West 17th Street since 1993. On March 25, 2002, its president Zvadin Krstic allegedly went to the Department of Finance (hereafter DOF), and, upon inquiry, was told by a Finance employee that the property was subject to a lien for delinquent payments but that payment of $11,338.28 would clear things up. Mr. Krstic paid the sum and allegedly made a further payment of $10,000 to the DOF on October 21, 2002. He returned to the DOF office on February 10, 2003, asked what he owed, and paid $17,596.65 again

allegedly on the advice of a DOF clerk. In the interim, a lien for unpaid taxes and other fees that had accumulated from 1999 to January, 2002 totaling $17,865.55, was certified by the City and transferred, on May 13, 2002, to NYCTL 1991-1 Trust, the plaintiff in this action.

Thereafter, plaintiff sued for a judgment of foreclosure and sale by serving defendant corporation on June 17, 2003, via the Secretary of State. The summons and complaint was forwarded by the Department of State to the address on file for 114 Tenth Avenue Assoc. and the envelope was returned marked "unclaimed."[1] A judgment of foreclosure was granted on defendant's default on March 1, 2005. Thereafter, a notice of sale was published in the Daily News and, on May 18, 2005, intervenor Carlton Capital Corp. purchased the building from plaintiff.

Defendant states that it first heard of the foreclosure on May 19th, and moved to vacate the judgment and sale by order to show cause on May 26, 2005, objecting that it had no notice of the proceeding and was prepared to pay all outstanding arrears. Defendant's president contended that he had no knowledge of the foreclosure proceeding and only learned of it when a tenant contacted him one day after the sale to intervenor Carlton Capital Corp. He asserts that the corporation

---

1. It appears that defendant continued to make tax and other payments on September 22, 2003, May 20, 2004, and June 9, 2004.

failed to receive service in the foreclosure proceeding because he had moved and had neglected to provide the Secretary of State with a current address for service of process. This fact was confirmed by the Office of the Secretary of State, which provided a statement that the process mailed to the corporate defendant had been returned marked "unclaimed."

On September 12, in an order filed on September 22, 2005, this court declined to vacate the judgment in the absence of any allegation of error or wrongdoing on the part of plaintiff or the Department of Finance. Defendant now contends that a subsequent change in the law and new facts unavailable at the time of its initial motion warrant renewal of the application for vacatur.

Defendant's current legal challenge asserts that the United States Supreme Court in *Jones v. Flowers,* 126 S. Ct. 1708, decided on April 28, 2006 after submission of the original motion, establishes that the ineffective service of process upon defendant corporation via the Secretary of State deprived it of due process of law under the 14th Amendment. In *Jones v. Flowers, supra,* the court considered whether service by the Arkansas Commissioner of State Lands of notices of tax delinquency and subsequent sale, mailed to an individual taxpayer by certified mail, were constitutionally adequate notice of deprivation of the tax payer's property, when both notices were returned to the Commissioner by the Post Office marked "unclaimed".

The facts of that case are similar to those at bar, in that the taxpayer in *Jones* failed to maintain a current address with the Commissioner despite a legal obligation to do so. Here, Mr. Krstic explains that he failed to update the corporation's address on file with the Secretary of State when he moved in 1993, and that this resulted in the return of the forwarded process to the Secretary of State's office marked "unclaimed".

In evaluating the constitutional requirements of notice, the court in *Jones* noted that while Mr. Jones should have diligently kept his address up to date and should have paid his taxes timely, "before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." The thrust of the due process ruling was not that actual notice was required, however, but that the Commissioner, after learning that notice was ineffective, was obliged to take reasonable follow up measures in response to the return of the certified letter.

Here, however, the Department of Finance, in serving process on the Secretary of State, was serving defendant's designated agent as provided in CPLR §311(a). Such service establishes jurisdiction over a corporation. Moreover, the Secretary of State did not notify the City that service did not accomplish notice, so that the question of a reasonable next step in light of proof of no notice is not raised in this case. Defendant's corporate status required that it designate the Secretary of State as its agent for the service of process.

That agent was served and the city never received any indication that service did not also provide defendant with notice of the proceeding being commenced. As this case is clearly distinguishable from *Jones v. Flowers, supra*, that case does not provide a basis for renewal of defendant's motion.

Defendant also contends that significant new facts unavailable to it at the time of the initial application necessitate renewal of the motion to vacate. One week after learning of the foreclosure sale, defendant's president sought vacatur on the ground that he had received no actual notice. In the months since that motion was denied, defendant has obtained city records revealing the manner in which defendant's tax payments made were credited to the various property taxes and other charges assessed against the property during the relevant three year period. Defendant asserts that those records reveal that payments been improperly credited.

According to defendant, the city's records reveal that the Department of Finance improperly credited tax payments to arrears that were the subject of an installment agreement, and credited other payments to currently due taxes rather than the oldest delinquent charges, in violation of the city's stated accounting practice. Defendant asserts that these errors resulted in the improper sale of the lien on the building in violation of City of New York Admin. Code § 11-319.

Corporation Counsel, appearing on behalf of the purchaser of the building, contends that the information

regarding the application of defendant's tax payments to the liabilities posted was available to defendant at the time of the original motion. Margaret Donadio, the Tax Lien Ombudsman for the Department of Finance states that this information is generally available on the Department of Finance's website. She further states, however, that after payments are made either by the taxpayer or by a lien purchaser, the records are purged from the web site. Full records including periods that have been purged, are maintained by the city, however, and are available from the mainframe computer upon request, either by telephone or letter.

Defendant's business manager describes in detail her efforts to locate and obtain the taxpayer's own bank records but there is no showing that the city records were sought either before or for several months after the court's initial decision. In the absence of any evidence that the records on which defendant relies were unavailable at the time of defendant's initial motion, the motion to renew the court's prior decision is denied.

This constitutes the decision and order of the court. Any issues raised by the parties and not addressed in this decision have nevertheless been considered and are denied.

Dated: December 11, 2006
New York, NY

s/ Saralee Evans
SARALEE EVANS, J.S.C.
HON. SARALEE EVANS

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY FILED SEPTEMBER 22, 2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Saralee Evans* PART *51*
Justice

INDEX NO. *109239/03*

MOTION SEQ. NO. *3*

NYCTL 1999-1 Trust

v.

114 Tenth Avenue Assoc., Inc.

* * *

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause/Affidavits – Exhibits . . .	*1, 2, 3, 4*
Answering Affidavits – Exhibits	*5, 6, 7*
Replying Affidavits	*8, 9*

Cross-Motion: ☑ Yes

Appendix D

Upon the foregoing papers, it is ordered that this motion

Zvadin Krstic, owner of defendant 114 Tenth Avenue Assoc., Inc., moves to set aside the foreclosure sale of his building, sold at auction to cross movant Carlton Capital Corp., on May 18, 2005, for $2,000,000. He seeks the equitable intervention of the court, stating that he was not served with notice of the foreclosure action and that he is prepared to pay the back taxes owed. The motion was filed on May 26, 2005. Purchaser Carlton Capital Corp. filed a cross motion seeking to intervene pursuant to CPLR § 1012(a)(3) as an entity that may be adversely affected by the court's ruling. Movant does not object to intervention, and that portion of the cross motion is therefore granted without opposition.

Defendant states that he was unaware of the foreclosure action until after the sale had taken place. He alleges that he no longer resides at the address listed with the Secretary of State for service of process upon the corporate owner and that he did not receive notice of the proceedings. He urges that his former girlfriend was improperly treated as a building owner and served in his stead. She was served, however, not as an owner but because she holds a mortgage on the building to secure Mr. Krstic's payment to her of child support for their son.

"A court may exercise its equitable powers to set aside a judicial sale only where fraud, collusion, mistake, or exploitive overreaching cases suspicion on the

fairness of the sale." *Otto Gerdau Co. v. Anasac Realty Corp.*, 251 AD2d 174 (1st Dept. 1998) quoting *Crossland Mtge. Corp. v. Frankel*, 192 AD2d 571, 572 (1993); *NYCTL 1996-1 Trust v. LJF Realty Corp.*, 307 AD2d 957 (2d Dept. 2003). Here, defendant's failure to provide the Secretary of State with his correct address may have prevented actual delivery. Actual receipt of papers, however, is generally irrelevant to whether service is proper. *Raschel v. Rish*, 69 NY2d 694, 697 (1983). Absent evidence of wrongdoing this court is without discretion to set aside the foreclosure sale. For the foregoing reasons, the motion is denied and the cross motion granted.

Dated: *9/12/05* s/ *Saralee Evans*
J.S.C.

Check one: ☑ FINAL DISPOSITION

APPENDIX E — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DATED FEBRUARY 19, 2008

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February 2008

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 179 SSD 6

NYCTL 1999-1 Trust, et al.,

Respondents,

v.

114 Tenth Avenue Assoc., Inc.,

Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix E

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX F — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DATED JUNE 3, 2008

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of June 2008

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 391

NYCTL 1999-1 Trust, et al.,

Respondents,

v.

114 Tenth Avenue Assoc., Inc.,

Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix F

A motion having heretofore been made herein upon the part of the appellant for reconsideration of this Court's February 19, 2008 dismissal order, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX G — PROVISIONS OF THE NEW YORK BUSINESS CORPORATIONS LAW

The following provisions of the New York Business Corporations Law, quoted in relevant part, are involved herein:

§ 304. Statutory designation of secretary of state as agent for service of process

(a) The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.

§ 306. Service of process

(b)(1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose.

Appendix G

§ 308. Records and certificates of department of state

The department of state shall keep a record of each process served upon the secretary of state under this chapter, including the date of service. It shall, upon request made within ten years of such service, issue a certificate under its seal certifying as to the receipt of the process by an authorized person, the date and place of such service and the receipt of the statutory fee.

APPENDIX H — PROVISIONS OF THE NEW YORK CITY ADMINISTRATIVE CODE

The following provisions of the New York City Administrative Code, quoted in relevant part, are involved herein:

§ 11-319. Sales of tax liens.

(b)(2)(i) The commissioner of finance may, in his or her discretion, sell a tax lien or tax liens through a negotiated sale . . . . provided, however, that if the negotiated sale is to a trust or other entity created by the city or in which the city has an ownership or residual interest, then the requirement that the notice advise that a request for statements of interest is available at the office of the department of finance shall not apply.

§ 11-332. Rights of purchaser of tax lien.

(a) Any purchaser of a tax lien or tax liens shall stand in the same position as the city and shall have all the rights and remedies that the city would have had if the tax lien or tax liens had not been sold.

§ 11-335. Foreclosure of tax liens.

If the amount of any tax lien which shall have been transferred by a tax lien certificate shall not be paid when . . . due, the holder of such tax lien certificate may maintain an action in the supreme court to foreclose such tax lien. . . . Except as otherwise provided in this chapter an action to foreclose a tax lien shall be regulated by

the provisions of the civil practice law and rules and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property.

§ 11-340. Effect of judgment foreclosing tax lien.

. . . So much of section three hundred seventeen of the civil practice law and rules as requires the court to allow a defendant to defend an action after final judgment shall not apply to an action to foreclose a tax lien.

§ 11-347. Corporation counsel to protect city in all proceedings relating to tax liens.

It shall be the duty of the corporation counsel to protect the interest of the city in all matters, actions and proceedings relating to tax liens and tax lien certificates; to intervene on behalf of the city or to make the city a party to any action in which the corporation counsel believes it to be to the interest of the city so to do, by reason of any matter arising under or relating to any tax lien or tax lien certificate, or advertisement of sale of tax liens. The corporation counsel in his or her discretion may represent the purchaser of a tax lien or the holder of a tax lien certificate in any action in which the corporation counsel believes it to be in the interest of the city so to do, by reason of any matter arising under or relating to any tax lien or tax lien certificate, or advertisement of sale of tax liens. All costs recovered in any action or proceeding conducted or defended by the corporation counsel pursuant to this section shall belong to the city and shall be collected, applied and disposed of in the same manner as are other costs recovered by the city.

106

(4)

No. 08-184

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

In the
Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,
Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1999-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of
the City of New York,
Attorney for Respondent
Trust and City
Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-0425

LEONARD J. KOERNER,*
VINCENT D'ORAZIO,
FRANCES HENN,
ILANA A. ECK,
Of Counsel.
*Attorney of Record

REPRINTED COPY

September 15, 2008

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The service of the Summons and Complaint in the foreclosure action were served on the Secretary of State as defendant corporation's statutorily designated agent, and the plaintiff strictly complied with the constitutional method of service on a corporate defendant authorized under New York Business Corporation Law §306.

Was the defendant afforded constitutionally sufficient notice of the tax lien foreclosure notice?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

A. THE HOLDING IN JONES ADDRESSED NOTICE REQUIREMENTS FOR A NATURAL PERSON AND DOES NOT RELIEVE A CORPORATION OF ITS OBLIGATION TO MAINTAIN A CURRENT ADDRESS WITH THE SECRETARY OF STATE 8

B. JONES DOES NOT RENDER SERVICE OF NOTICE ON A STATUTORILY DESIGNATED AGENT UNCONSTITUTIONAL, NOR DOES THE DECISION REQUIRE AN INVESTIGATIVE

ACT TO ENSURE TRANSMITTAL FROM THE AGENT TO ITS PRINCIPAL..... 11

C. THE DECISION IN JONES WAS PREDICATED ON THE FORECLOSING PARTY'S ACTUAL KNOWLEDGE OF THE PROPERTY OWNER'S NON-RECEIPT OF NOTICE OF FORECLOSURE..... 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **Pages**

Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.,
67 N.Y.2d 138 (1986).....13

Jones v. Flowers,
126 S. Ct. 1708 (2006).....Passim

Kaplan v. D'Agostino Supermarkets,
210 A.D.2d 79 (1st Dept. 1994).....12

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (195).....6

OTHER AUTHORITIES

Administrative Code § 11-335.....10

BCL § 304.....12

BCL § 306.....Passim

CPLR § 311(1).....10

2 D. Kirk Drussel and Mary Anne Foran,
Mortgages and Mortgage Foreclosure in New York,
§ 33:3 (2001) 10

OPINIONS BELOW

The decision of the New York State Supreme Court, Appellate Division, First Department ("First Department"), is reported at 44 A.D.3d 576 (1st Dept. 2007); it is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1a-3a.

The motion for reargument or, in the alternative, for leave to appeal to the New York State Court of Appeals ("Court of Appeals") from the decision of the Appellate Division, was denied by order dated February 26, 2008. The denial is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 4a-5a.

The notice of appeal to the Court of Appeals was dismissed by the Court *sua sponte* by order dated February 19, 2008. The dismissal is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 16a-17a.

The motion for reconsideration of the dismissal decision of the Court of Appeals was denied by order dated June 3, 2008. The denial is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 18a-19a.

STATEMENT OF THE CASE

Plaintiff-respondent NYCTL 1999-1 Trust ("Respondent") instituted this foreclosure action seeking to enforce a tax lien on property identified on the New York County Tax Map as Block 715, Lot 1 (the "property"), sold by the City of New York (the "City") to Respondent, on May 13, 2002. (R. 10).[1]

Respondent commenced this action in the Supreme Court of the State of New York, New York County ("Lower Court"), on May 20, 2003. (R.68-75). On June 17, 2003, Defendant-appellant 114 Tenth Avenue Assoc. ("Appellant") was served with the Summons and Complaint pursuant to the provisions of section 306 of the Business Corporation Law ("BCL § 306"), when two copies of the Summons and Complaint were delivered to the Secretary of State – Appellant's statutorily designated agent for service of process – with the requisite fee. (R. 78, 79). Under BCL § 306, the Secretary of State was required to forward a copy of the Summons and Complaint to Appellant by certified mail to the address Appellant itself provided to the Secretary of State for such purpose. (R. 184, ¶ 5). There is no proof in the record that

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[1] Unless otherwise indicated, all numerical citations in parenthesis refer to the Record on Appeal before the Appellate Division, certified on June 27, 2007.

Respondent knew or should have known whether Appellant received actual notice of this action.[2]

A Judgment of Foreclosure and Sale was issued by the Lower Court, by default, on October 6, 2004. (R.115-121). The Judgment was entered in the New York County Clerk's Office on March 1, 2005. (R. 121). On May 18, 2005, the property was sold at a public auction. (R. 126).

After the auction sale, Appellant moved to vacate the default and set aside the Judgment of Foreclosure by Order to Show Cause dated May 27, 2005. (R.128-130).

By Order dated September 12, 2005, the Lower Court denied Appellant's motion to vacate the Foreclosure Judgment and Sale. App. 13a-15a. The Lower Court held that it was "without discretion to set aside the foreclosure sale" because there was no "evidence of wrongdoing." App. 15a. Moreover, the Lower Court found that although Appellant's "failure to provide the Secretary of State with his correct address may have prevented actual delivery...[a]ctual receipt of papers...is generally irrelevant to whether service is proper." App. 15a.

After the Lower Court denied Appellant's original motion, by Notice of Motion

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[2] Under the plain language of BCL § 306, service on a Appellant was complete on July 17, 2003, when the Secretary of State was served. BCL § 306 provides that "[s]ervice of process on such corporation shall be complete when the secretary of state is so served."

dated May 5, 2006, Appellant moved for Renewal of its motion to vacate the Foreclosure Judgment and Sale ("Motion for Renewal"), in part because of this Court's decision in Jones v. Flowers, 126 S. Ct. 1708 (2006).

By Decision and Order dated December 11, 2006, the Lower Court denied Appellant's Motion for Renewal. App. 6a-12a. In its decision, the Lower Court held that Jones "is clearly distinguishable" from the instant case and therefore "does not provide a basis for renewal." App. 11a.

Appellant appealed the Lower Court's orders to the Appellate Division, First Department. By decision dated October 30, 2007 (the "decision and order"), the First Department unanimously affirmed the Lower Court's decisions denying Appellant's motions to vacate the Foreclosure Judgment and Sale. App.1a-3a. The First Department held that Appellant was properly served with notice of the foreclosure action in accordance with Business Corporation Law § 306, and Appellant's failure to receive service of process was due to Appellant's breach of its own responsibility to keep a current address on file with the Secretary of State. In addition, the First Department rejected the constitutional argument raised by Appellant in its motion to renew because Jones was "readily distinguishable" and inapplicable to the instant action where "process was served...pursuant to Business Corporation

Law § 306...on the Secretary of State as the designated agent of a corporation." App. 2a-3a.

REASONS FOR DENYING THE PETITION

The New York Appellate Division Properly Held That Appellant Was Afforded Constitutionally Sufficient Notice of the Foreclosure Sale.

Appellant asked the New York Appellate Division, First Department to extend this Court's holding in Jones v. Flowers, 126 S. Ct. 1708 (2006), and require a foreclosing party to engage in some investigative endeavor to determine whether or not the owner has received actual notice of the foreclosure action. The First Department properly applied established precedent and held that Appellant was afforded constitutionally sufficient notice of the foreclosure sale when Respondent strictly complied with the service requirements of section 306 of the Business Corporation Law ("BCL § 306"). The First Department held that Appellant corporation's failure to receive actual notice was "due to its breach of its responsibility to keep a current address on file with the Secretary of State and does not constitute a reasonable excuse to vacate the judgment." App. 2a.

Appellant's failure to receive actual notice of the foreclosure does not vitiate the validity of the service of process, as actual notice is not

required to satisfy due process. See Jones, 126 S. Ct. at 1713 ("Due process does not require that a property owner receive actual notice before the government may take his property"). The relevant inquiry regarding the sufficiency of notice afforded in the case of a foreclosure action is whether the notice was "reasonably calculated, under all the circumstances, to apprise" the owner of the foreclosure action so that the owner may have an opportunity to appear and be heard. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Contrary to Appellant's contention, Jones does not require the plaintiff in a foreclosure action to take some affirmative steps to ascertain whether notice was received by the property owner. Rather, the specific issue raised in Jones was whether due process requires the government to take additional reasonable steps to notify the property owner when the government has actual knowledge that the property owner did not receive the notice because it was returned to the government as "undelivered." 126 Sup. Ct. at 1714.

The issues raised by Appellant are clearly distinguishable from the facts in Jones. Moreover, the facts of the instant case are extremely fact and case specific and do not have broad reaching impact. While the facts of this case may be novel, the legal issues raised are not novel,

and there is no conflict among any state or federal courts regarding this issue.[3]

This Court's decision in Jones does not render service under BCL § 306 unconstitutional. As set forth more fully below, Jones is readily distinguishable from the instant case for the following reasons: (A) Jones addressed notice requirements for a natural person and does not relieve a corporation of its obligation to maintain a current address with the Secretary of State; (B) Appellant was properly served and Respondent did not obtain knowledge of Appellant's failure to receive actual notice of the action against him; and (C) Jones does not render service of notice on a statutorily designated agent unconstitutional nor does it require an investigative act to insure transmission from the agent to its principal.

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[3] Appellant's reference to other states that permit service of process for a corporation on a statutorily designated agent is insufficient to warrant review in this instant case. Appellant has failed to point to any decisions – state or federal – which evince a conflict between the state high courts or the circuits regarding this issue. Petition Point II(A).

A. THE HOLDING IN JONES ADDRESSED NOTICE REQUIREMENTS FOR A NATURAL PERSON AND DOES NOT RELIEVE A CORPORATION OF ITS OBLIGATION TO MAINTAIN A CURRENT ADDRESS WITH THE SECRETARY OF STATE

The Court's decision in Jones is not applicable to the facts of this case because a corporation, unlike a natural person, is a sophisticated business entity with additional requirements imposed upon it in exchange for its corporate status.

New York State requires, as a condition of its grant of corporate status, that a corporation designate the Secretary of State as its agent for service of process and provide a physical address to which the same may be forwarded. The policy behind this statutorily imposed requirement is to ensure that domestic corporations do not escape liability in any type of action by evading jurisdiction. The New York law in effect, holds a corporate defendant to the address it has provided to the Secretary of State for forwarding process is totally different from the Arkansas statute that obligated Jones, a natural person, to keep his address current with the local taxing authority.

Unlike the defendant in Jones, Appellant "114 Tenth Avenue Assoc., Inc." is a legal fiction that lacks a physical location in the state.

BCL §306 makes it possible to serve any New York corporation by serving the Secretary of State and absent such statutory designation, it would be difficult – perhaps even impracticable – for any plaintiff to serve process on and obtain personal jurisdiction over Appellant. For this reason alone there is ample reason to justify that service of process on Appellant, and any other corporation, may be accomplished by service on the Secretary of State.

In Jones, the individual defendant's legal obligation to inform the Arkansas taxing authorities of his current address advanced the State's interest in the efficient administration of tax assessment and collection. Jones' failure to keep his address current only imperiled his own interests. By contrast, the policy rationale that prevents a defendant domestic corporation from escaping the personal jurisdiction of New York courts by failing to update the address it has put on file with the Secretary of State has an entirely different breadth. Absent such a requirement under the law, a domestic corporation could effectively place itself beyond the reach of New York courts and aggrieved parties, thus affecting not only its own interests, but imperiling the interests of the public at large.

Furthermore, unlike the individual defendant in Jones, Appellant corporation received something valuable from the State in exchange for its consent to be served via the Secretary of State – namely a sovereign grant of corporate legal status,

with its attendant limitations on shareholder liability. Having accepted the benefits of corporate status, Appellant should not now be heard to complain of the consequences of its own failure to comply with corporate responsibilities.[4] The State of New York afforded Appellant all of the process to which it was entitled by permitting it to be served under the same rules and in the same manner as any other domestic corporation in any other lawsuit.[5]

---

[4] Appellant concedes that its failure to update its address on file with the Secretary of State endured for ten years. (R. 132). This is not inconsistent with its record of neglecting its tax payments. While Appellant contends that it would have "undoubtedly redeemed the property...for the judgment amount" had it received actual notice of the foreclosure, Appellant's contention is dubious give that Appellant is a chronic tax delinquent who has never paid its taxes on time and who had checks returned for insufficient funds on three occasions. (R. 284-85).

[5] See NYC Administrative Code, § 11-335, applicable to the foreclosure of tax liens purchased from the City of New York, provides: "Except as otherwise provided in this chapter an action to foreclose a tax lien shall be regulated by the provisions of the civil practice law and rules and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property." See also 2 D. Kirk Drussel and Mary Anne Foran, Mortgages and Mortgage Foreclosure in New York, § 33:3 (2001), asserting that in an action to foreclose a mortgage "[p]ersonal service in the ordinary manner on a defendant who is...a domestic corporation...will suffice for all purposes, in rem and in personam." (referencing CPLR § 311(1), referencing, in turn, BCL § 306).

B. JONES DOES NOT RENDER SERVICE OF NOTICE ON A STATUTORILY DESIGNATED AGENT UNCONSTITUTIONAL, NOR DOES THE DECISION REQUIRE AN INVESTIGATIVE ACT TO ENSURE TRANSMISSION FROM THE AGENT TO ITS PRINCIPAL

Appellant's reliance on Jones in the instant case is grossly misplaced, in part, because the principal/agent relationship between Appellant and the Secretary of State in the instant action has no counterpart in Jones. Appellant seeks to minimize the distinction between service on a natural person and service on a corporation's agent. However, in Jones, the distinction is germane to the Court's decision. A fundamental fact that distinguishes the instant case from Jones is that under New York law, Respondent successfully served Appellant with the summons and complaint by serving Appellant's statutorily designated agent, the Secretary of State. See BCL § 306(b) ("Service of process on such corporation shall be complete when the secretary of state is so served"). Whereas in Jones, the Commissioner attempted to directly serve notice of the tax delinquency on Jones, a natural person, and learned that it was unsuccessful in that endeavor when the certified mailing was returned as "undeliverable." Nowhere in Jones does this Court address the issue of whether service on a statutorily designated agent comports with due process and it is unwarranted

for Appellant to claim that under Jones such service is insufficient to satisfy due process.

As a condition of the grant of the corporate form, its attendant privileges and immunities, and the authority to do business in the State, Appellant has explicitly agreed to designate the Secretary of State as its agent for service of process. See BCL § 304(a) & (b). Appellant has received significant benefits, including limited liability, in consideration for approval of its corporate status and ability to transact business in the State of New York. Appellant cannot now seek to reap the benefits of its status without having the accompanying requirements of the law imposed upon it.

Moreover, while this Court affirmed that an individual's failure to comply with its statutory obligation to keep his address updated does not forfeit the individual's right to constitutionally sufficient notice, a corporation is a sophisticated entity that is charged with a duty to know the laws imposed upon it and strictly comply with its legal obligations. Because the law specifically states that the Secretary of State will forward service of process accepted on a corporation's behalf to the corporation's address on file with the Secretary of State, New York courts have held that a corporation cannot complain of non-receipt of the forwarded process where, as here, the corporation admits that it failed to update its address for ten years. (R. 132) See Kaplan v. D'Agostino Supermarkets, 210 A.D.2d 79, 79 (1st

Dept. 1994) (affirming that corporation's failure to update address for ten years was "inexcusable"); see also Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138 (1986) (advising that courts should consider length of time for which the address on file with the Secretary of State has not been kept current by the corporation in determining where non-receipt is excuse for vacating default judgment).

Despite the reasonableness of Respondent's actions under the circumstances present in this case, Appellant asks this Court to extend the holding in Jones and require a foreclosing party to engage in some investigative endeavor to determine whether or not the owner has received actual notice of the foreclosure action. This plea is entirely inapposite to this Court's decision in Jones, as Jones expressly stated that actual notice is not required. 126 S. Ct. at 1713. Rather, the specific issue raised in Jones was whether due process requires the government to take additional reasonable steps to notify the property owner when the government has actual knowledge that the property owner did not receive the notice because it was returned to the government as "undelivered." 126 Sup. Ct. at 1714. In Jones, the duty to take additional reasonable steps required to comport with due process was a unique "circumstance and condition" that varied the notice required in that particular case. Id. at 1714. Here, no such circumstances or conditions were present as there is no evidence that

Respondent knew or should have known that Appellant did not receive actual notice, and Jones does not require the additional steps absent such varying facts.

C. THE DECISION IN JONES WAS PREDICATED ON THE FORECLOSING PARTY'S ACTUAL KNOWLEDGE OF THE PROPERTY OWNER'S NON-RECEIPT OF NOTICE OF FORECLOSURE

In Jones, the Arkansas Commissioner of State Lands (the "Commissioner") arranged for a private sale of real property owned by Gary Jones, a natural person, to satisfy unpaid tax liabilities on his property. 126 S. Ct. at 1712. The Commissioner sent notice of the pending sale to Jones by certified mail. Id. The mail was returned to the Commissioner as "undelivered" and no further attempts at notice were made, other than publication of the public sale in a local newspaper. Id. This Court held that since the notice required by the Arkansas statute "promptly provide[d] additional information to the government about the effectiveness of notice" the Commissioner knew that the certified letter mailed to Mr. Jones was returned to him as "undelivered." Id. at 1717. Under the unique circumstances present in the case – namely that the Commissioner knew that notice of the tax sale was not received by the property owner because it was returned as "unclaimed" – this Court held that "the State must

take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." Id. at 1714.

The State's obligation to take "additional reasonable steps to attempt to provide notice" was based on the fact that the State had actual knowledge that the notice was not received. This Court also predicted that there may be some instances where "there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter," and in those situations the government could not "be faulted for doing nothing." Id. at 1718.

In the instant case, Appellant concedes that Respondent did not possess knowledge of Appellant's non-receipt of the forwarded copy of the summons and complaint when the judgment of foreclosure was entered and the property was sold. Petition at 9. Undeniably, Respondent served the summons and complaint on Appellant's statutorily designated agent, the Secretary of State, and therefore any undeliverable or returned mail would not be returned to Respondent since the Secretary of State was responsible for forwarding the process to Appellant. See BCL § 306(b)(1). Here, Respondent did not have any knowledge of whether or when Appellant received notice of the instant action, nor was it required to ascertain such information. Therefore, there were "no reasonable additional steps the government could have taken" and Respondent

cannot be faulted under the circumstances and facts of this case. See Jones, 126 Sup. Ct. at 1718.

Finally, Appellant's argument regarding the Trust's status as a private or public actor is a red herring raised to obscure the fact that Appellant received constitutionally sufficient notice under BCL §306 - a valid statute which Respondents undisputedly strictly complied with. Whether the Trust is deemed a private or public actor is of no moment to the issue on appeal, as Appellant was afforded constitutionally sufficient notice in the instant action. Accordingly, the petition for a writ of certiorari is not worthy of the Court's review and should be denied.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for Respondent
100 Church Street
New York, N.Y. 10007
(212) 788-0425

LEONARD J. KOERNER,*
VINCENT D'ORAZIO,
FRANCES HENN,
ILANA A. ECK,
Of Counsel.
*Attorney of Record

September 15, 2008

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(2)

No. 08-184

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT CARLTON CAPITAL CORP.

MICHAEL T. SUCHER, ESQ.
Counsel of Record
DANIELLE E. SUCHER, ESQ.
ANDREW M. SHABASSON, ESQ.
26 Court Street, Suite 2412
Brooklyn, New York 11242
(718) 522-1995

Counsel for Respondent Carlton Capital Corp.

QUESTIONS PRESENTED

Petitioner, a corporate landowner in New York, failed to pay its real estate taxes, and the City of New York sold the tax lien to a Tax Lien Trust (the "Trust"), which duly commenced a judicial foreclosure proceeding and, after obtaining a judgment of foreclosure on default, sold the property at auction.

Petitioner seeks to have this Court extend the holding in *Jones v. Flowers*, 547 U.S. 220 (2006) to the facts in this case in order to vacate that sale.

New York law provides that a party wishing to be relieved of a default judgment must show both a meritorious defense and excusable neglect. On such a motion before the Court that issued the judgment of foreclosure on default, Petitioner failed to make an adequate showing of both a meritorious defense and excusable neglect, and the motion was denied.

Petitioner moved to reargue that motion. The reargument motion was denied, and never appealed.

Petitioner then moved to renew the prior motion seeking to be relieved of a default judgment, principally on the grounds that subsequent to the making of the initial motion, this Court had decided *Jones v. Flowers*, which Petitioner argued materially changed the law and mandated vacature of the default judgment on the grounds that same was violative of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

As such, the petition presents two questions regarding notice of a judicial tax lien foreclosure proceeding:

1) Does a Trust created to hold and liquidate real estate tax liens conveyed to it by a city, which seeks to liquidate those tax liens through Judicial foreclosure proceedings, exhibit sufficient state action to invoke the obligations of Due Process required under the Fourteenth Amendment to the Federal Constitution?

2) Must a party seeking to commence a judicial foreclosure proceeding against a corporate landowner affirmatively take steps to determine whether the initial notice, as personally delivered to the Secretary of State as agent for the corporate landowner, was *or was not* returned unclaimed to the Secretary of State when it was mailed by the Secretary of State to the corporate landowner, and if so, take additional steps reasonably designed to give actual notice of the foreclosure proceeding to the corporate landowner?

CORPORATE DISCLOSURE STATEMENT

The Respondent, Carlton Capital Corp. ("Carlton") is wholly owned by individuals, and has no parent corporations. No publicly held company owns 10% or more of Carlton Capital Corp.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vi
INTRODUCTION	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	7
THE PETITION SHOULD BE DENIED BECAUSE THE TRUST DID NOT VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS	7
A. State Action is Presumed for the Purposes of this Petition	7

Contents

Page

B. Jones Should Not Be Extended to Require Investigative Acts 8

C. The Trust is Not Responsible For the Actions of, Nor Chargeable With, the Knowledge of the Secretary of State 15

D. No Practical Alternative Steps Existed to Effectively Serve Petitioner 19

E. Court Proceedings That Offer Relief From Default Judgments Upon a Showing of Excusable Neglect and a Meritorious Defense Meet All Due Process Requirements 22

CONCLUSION 24

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

United States Supreme Court Cases

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 4

Dennis v. Sparks,
449 U.S. 24 (1980) 7

Dusenbery v. United States,
534 U.S. 161 (2002) 9, 11

Greene v. Lindsay,
456 U.S. 444 (1982) 19, 20

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547 U.S. 220 (2006) ..... *passim*

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 7

National Bank v. National Herkimer County Bank, 225 U.S. 178 (1912) 17

Robinson v. Hanrahan,
409 U.S. 38 (1972) 10

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 7-8

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Page

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486 U.S. 694 (1988) 17

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Circuit Court Cases

Fleming v. Asbill,
42 F.3d 886 (4th Cir. 1994) 7

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333 F.3d 64 (2nd Cir. 2002) 3

Taylor v. Westly,
488 F.3d 1197 (9th Cir. 2007) 15

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98 N.Y.2d 735 (2002) 18

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52 A.D.2d 524 (1st Dept. 1976) 23

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Page

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v. Peddlers Pond Holding Corp.,
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2006 WY 126 (Wyo. 2006) 15

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75 Ind. L.J. 747 (2000) 8

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Page

Statutes

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NY CPLR 311 21

NY CPLR 5015 ..... 20, 23

NY CLS St Admin P Act § 102(1) 18

U.S. Const. Amend. XIV, § 1 3

NY Business Corporation Law ("BCL") §306 ..... *passim*

BCL § 304(a) 3

11 U.S.C. §362(a). 6

42 U.S.C. §1983 7

Bankruptcy Code, title 11 U.S.C. Chapter 11 .. 3, 6

INTRODUCTION

In 2006, this Court decided *Jones v. Flowers* to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a *non-judicial* tax sale is returned undelivered.

In *Jones*, a State Commissioner sent notices directly to an individual landowner and, after he learned directly that said notices were returned unclaimed, took no further steps to provide notice to the landowner of the impending sale of his property.

This Court held that under such circumstances: "The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case." *Id.* at 239.

In the instant case, the NYC Tax Lien Trust commenced a *judicial* foreclosure proceeding against Petitioner by actually delivering copies of the summons and complaint to the New York Secretary of State, who, in turn, pursuant to statute, mailed a copy of the same by certified mail to the Petitioner at the address last provided for that purpose by Petitioner.

While the mailing by the Secretary of State was returned "unclaimed" to the Secretary of State, resulting in Petitioner not receiving actual notice of the commencement of the judicial foreclosure proceeding, neither the Trust nor Respondent Carlton ever knew

of the mailing being returned unclaimed prior to the date of the sale.

Petitioner seeks, by this Appeal, to have this Court extend *Jones v. Flowers* and thereby engraft onto the New York Statute providing for the method of service of process upon corporations the novel requirements, that: 1) a party seeking to serve a corporation, at least in a tax lien foreclosure case, must inquire of the corporate agent whether the mailing notice to the landowner was received or returned; and 2) if returned, take additional, unspecified steps to notify Petitioner of the commencement of the foreclosure proceeding.

Respondent Carlton argues that no inquiry of the corporation's agent is required under the Constitution, and that even if the Trust had timely learned that Petitioner had no actual notice of the commencement of the judicial foreclosure proceeding, which was not true here, no alternative, reasonable means were available to it to validly effect service of process.

OPINION BELOW

The nature of the Opinion below is adequately stated in the Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

The nature of the Jurisdiction of this Court is adequately stated in the Petition for a Writ of Certiorari, with the following exception.

Though the closing of title has not yet occurred, and the same is presently stayed pursuant to the Order of the Supreme Court, State of New York, no stay of the closing was effected by the Petitioner's filing of a petition under the Bankruptcy Code, title 11 U.S.C. Chapter 11. *Rodgers v. County of Monroe* (In re Rodgers), 333 F.3d 64 (2nd Cir. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that "no State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

This action was commenced by the filing of a summons and complaint on May 20, 2003, seeking to enforce an assigned tax lien certificate by foreclosing Petitioner's interest in the real property located at 114 10th Avenue, New York, New York (the "Premises").

Service of the summons and complaint on Petitioner was accomplished by serving two copies of the summons and complaint along with the statutory fee on the New York Secretary of State pursuant to NY Business Corporation Law ("BCL") §306, which under NY Civil Practice Law and Rules ("CPLR") 311(a) is a proper method for obtaining personal jurisdiction over a corporation.[1]

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1. Under BCL §304(a) "[t]he secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served."

The certified mailing to the Petitioner by the Secretary of State, as required by BCL §306, was made to the address the Petitioner itself had listed with the Secretary of State upon formation, but which it failed to keep properly updated for nearly ten (10) years.

In due course, a Judgment of Foreclosure and Sale was issued by the Court, on default, on October 6, 2004.

In connection with duly scheduling a sale of the property, notice of the sale was published for four consecutive weeks in the New York Daily News, thus giving widely-distributed public notice of the impending foreclosure sale of the Subject Property.

On May 18, 2005, pursuant to the Judgment of Foreclosure and Sale, the advertised public auction of the Premises was held. Respondent, Carlton Capital Corp. appeared at the said auction and successfully purchased the property with a high bid of two million ($2,000,000.) dollars.[2]

Nine days after the auction sale, by order to show cause dated May 27, 2005 (the "Vacatur Motion"), Petitioner moved to have the judgment of foreclosure set aside on the basis of a two page affidavit by the president and sole owner of Petitioner, whose sole "evidentiary" allegations consisted of the following two (2) paragraphs:

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2. Fair market value for the Premises as a matter or law. See., e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) ("fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale. . . .").

> 3. I have never been served with any papers in this foreclosure action and only learned on May 19, 2005 about the auction sale held on May 18, 2005 from a tenant in my building.
>
> 4. I have information that my former girlfriend and defendant Karen Nason has been receiving copies of the legal papers in this foreclosure action and has never informed me regarding same.

By notice of cross-motion dated June 8, 2005 Carlton moved for intervention and for denial of Petitioner's Vacatur Motion, arguing, *inter alia*, that Petitioner's equity of redemption was extinguished by the foreclosure sale; that no proper basis for excusable neglect had been alleged; and, that no meritorious defense had been made out.

By order dated September 12, 2005, the Supreme Court denied Petitioner's Vacatur Motion and granted Carlton's cross-motion for intervention, ruling, *inter alia*, that an auction sale may only be set aside where fraud, collusion, mistake or exploitive overreaching cast suspicion on the fairness of the sale; and that Plaintiff's service on the Secretary of State was proper service, regardless of the failure of actual delivery to Petitioner, which resulted from Petitioner's own failure to update its address with the Secretary of State for nearly ten (10) years.

All papers submitted by all parties on Petitioner's original Vacatur Motion were silent on whether the certified mailing sent by the Secretary of State under BCL §306 was returned unclaimed, or otherwise.

Contemporaneously with the filing of a notice of appeal from the Order denying the Vacatur Motion, Petitioner served a motion for reargument on or about November 4, 2005.

On November 10, 2005 Petitioner filed for relief under Chapter 11 of the United States Bankruptcy Code for the Southern District of New York under File No. 05-60099 (ALG), thus staying further proceedings in all Courts pursuant to 11 U.S.C. §362(a).

Within weeks of the Chapter 11 filing, Petitioner brought a motion before the bankruptcy court seeking a grant of the very relief denied by the September 12, 2005 Order.

Carlton opposed the Petitioner's (therein, "Debtor") motion, and filed a motion to lift the automatic stay with the Bankruptcy Court. By order dated March 7, 2006, U.S. Bankruptcy Judge, Alan L. Gropper denied the Petitioner's motion, and lifted the automatic stay specifically "to permit the continuation and completion of the pending State Court reargument and appellate process."

Thereafter, by amended notice of motion dated May 5, 2006, Petitioner moved the State Supreme Court for renewal of the Vacatur Motion, claiming that the *Jones* case constituted a "change in the law that would change the prior determination."

By decision and order dated December 11, 2006, N.Y. State Supreme Court Justice Saralee Evans denied Petitioner's motion to renew the Vacatur Motion.

The Appellate Division of The Supreme Court of The State of New York affirmed, and the instant Petition for Writ of Certiorari is addressed to that affirmance.

REASONS FOR DENYING THE PETITION

THE PETITION SHOULD BE DENIED BECAUSE THE TRUST DID NOT VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS

A. State Action is Presumed for the Purposes of this Petition

In the context of 42 U.S.C. §1983, this Court has been held that "private lawyers do not 'act under color of state law' merely by making use of the state's court system." *Fleming v. Asbill*, 42 F.3d 886, 890 (4th Cir. 1994) (citing *Dennis v. Sparks*, 449 U.S. 24, 28, (1980)).

Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge for the purposes of §1983 liability as to acting "under color of state law". *Dennis v. Sparks, Id.*

Notably, §1983's requirement of action "under color of state law" is identical to the "state action" requirement of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

Notwithstanding, it has been held that a party that makes "use of state procedures with the overt, significant assistance of state officials" (*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S.

478, 486 (1988)), generally presents state action sufficient to invoke the protections of due process. In a judicial foreclosure proceeding such as the one at bar, a court appointed referee is employed to actually supervise the auction sale of property.

Thus, it appears that the question of whether the private securitization of tax liens, and the subsequent foreclosure thereof, fairly raises the Trust's acts to those comprising state action is very much an open issue. *See* F. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 Ind. L.J. 747, 764 n.102 (2000).

Nevertheless, for purposes of Respondent, Carlton's opposition to the Petition for a Writ of Certiorari, we presume that the Trust's actions in invoking state court process in a judicial foreclosure proceeding obligated it to assume a state's full Fourteenth Amendment obligations.

For the reasons that follow, it is submitted that, even though state action is presumed to be present, Petitioner suffered no deprivation of its Due Process rights under the Fourteenth Amendment.

B. Jones Should Not Be Extended to Require Investigative Acts

Jones v. Flowers should not be extended through this case to require any investigative acts by parties attempting to serve process upon corporate defendants.

There is a Constitutionally significant difference between ignoring knowledge already possessed, and not

affirmatively investigating in order to acquire knowledge, regardless of how minimally intrusive that investigative activity may appear. In the case at bar, the Trust had no knowledge of the certified mailing being returned unclaimed, and *Jones* simply does not require the taking of any act to investigate delivery or non-delivery of notice of process.

Jones fills a gap in Constitutional jurisprudence, which avoids the unseemly result of a state actor having actual knowledge of the non-receipt of a jurisdictional notice by an individual party whose rights are sought to be affected, *and despite that actual knowledge*, proceeds to obtain the requested remedy, on default.

Since the pre-requisite of knowledge does not exist on the part of the Trust in the case at bar, the additional steps required by *Jones* in order to effect jurisdiction do not come into play.

This Court in *Jones* did not require that a party to be served receive actual notice of process. Ratifying its prior holding in *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) on this issue, this Court stated: "Due process does not require that a property owner receive actual notice before the government may take his property." *Jones*, at 226.

The sharp issue before the Court was "whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." *Id.* at 227.

Further, the Supreme Court stated that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Id.* at 230.

Here, the Trust, or the City of New York (the "City"), as, *arguendo*, the party behind the Trust, patently did not have any knowledge of the summons and complaint being returned unclaimed by Petitioner.[3]

What is before this Court is not the situation addressed by *Jones*, i.e., the advance knowledge of a party attempting to provide notice that it *would* learn of the ultimate delivery or non-delivery of the notice. Instead, this case presents the very opposite condition, being where the party attempting to provide notice actually knew that it *would not* learn of the ultimate delivery or not of the notice.

Thus, knowledge of whether or not the notice was ultimately going to be received was *not* unique information about the intended recipient that had to be considered at the time service was attempted. *See Robinson v. Hanrahan*, 409 U.S. 38 (1972).

Using the *ex ante* approach, if there would never be any knowledge absent investigation, the party attempting to give notice only need be concerned with the reasonableness of the method of service itself – and not, from a Constitutional point of view, whether the attempted service was ultimately successful.

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3. Nor did Respondent, Carlton.

If the rule were otherwise, and investigation were required to learn whether actual notice were received, barring which, additional efforts would always be required, the *Dusenbery* rule would collapse into a virtual requirement that actual notice be given in all cases. This Court drew the line to require investigation only where the government has actual knowledge that service has failed. Were the Court to require investigation and further attempts at service in case of failure in every instance, it would remove all meaning from the Court's current requirement of service "reasonably designed to give actual notice."

Petitioner's assertion to this Court that the Trust, in attempting to give notice below, purposefully chose to utilize substitute, Secretary of State service to shield it from knowing whether its attempt at service was successful or not is pure speculation, and not a foundation upon which a rule of Constitutional Law should be based.

Petitioner is asking this Court to substantially expand its holding in *Jones*, when the Court took pains to sharply limit the reach and ambit of that decision.

In *Jones* the notice at issue was served by the Arkansas Tax Commissioner directly and returned to the Commissioner directly: "[the commissioner] attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones . . . the post office returned the unopened packet to the Commissioner marked 'unclaimed.'" *Id.* at 224.

In the case at bar, the Trust served the Secretary of State with two copies of the summons and complaint, and there is no indication in the record nor is there any allegation by Petitioner that the Trust ever had any actual knowledge of whether the mailing was returned unclaimed to the Secretary of State.

The fact that there is no requirement under New York law that a party utilizing the service modality afforded by BCL §306 follow up or investigate whether the Secretary of State's mailing was or was not actually received by the party to be served, is not a basis for finding that the party attempting service is turning a blind eye in an attempt to *evade Jones*. As will be discussed below, there were no good alternative means of service available to the Trust.

Nevertheless, Petitioner seeks to have this Court engraft onto NY BCL §306 a Constitutional requirement of investigation that exists nowhere in *Jones*.

In *Jones*, this Court asked (and answered in the affirmative) the question of whether "knowledge on the government's part" of undelivered notice is a "circumstance and condition" that varies the kind of notice required. *Id* at 227.

The Court in *Jones* did not address the question of whether the government "could" learn of the notice's non-delivery, or even whether the government "should" learn of the notice's non-delivery.

Putting it another way, Petitioner is asking this Court to hold that the mere *availability* of knowledge that could be obtained only through active inquiry into whether a party sought to be served was or was not actually given notice by the service method, is a "circumstance and condition" that varies the kind of notice required.

The Court in *Jones* addressed the elementary question of whether a party with *actual* knowledge of non-delivery could turn a blind eye, and simply ignore knowledge it already possessed.

The Court in *Jones* did not address whether and to what extent the Constitution requires a party seeking to provide notice must investigate into whether such notice, "reasonably calculated to inform," actually does inform, *post hoc*.

Petitioner argues that the making of a phone call or written inquiry to the Secretary of State is an easy step to take, and would not be too large of a burden for the Tax Trust to have undertaken in order to confirm delivery or non-delivery of notice of process.[4]

Yet, the making of a phone call or written inquiry is certainly no less burdensome than looking up a phone number in a phonebook, and that arguably minimal activity was expressly determined to be unnecessary in an analogous part of the *Jones* case itself. ("Jones believes that the Commissioner should have searched

4. Notably, there is no showing that either a phone directory search or an internet search would have revealed any address for Petitioner.

for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far.") *Id.* at 236.

The real problem with requiring *any* investigation in seeking to determine if a party to whom notice is addressed actually received such notice, is that there is no logical end to that requirement.

If a party is required to do an investigative act to learn if service was or was not successfully received, and upon learning that the service attempt was unsuccessful, to take additional reasonable steps to attempt to provide notice, the serving party would perforce also be required to investigate whether the additional steps taken, were or were not successful, themselves.

The Constitutional cannot require such an infinite cycle of investigation.

This Court has never held that a party intending to provide notice must investigate, after an attempt at notice, to seek to determine if the notice given was effective.

To the contrary, this Court has held that notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent" in cases where "the government attempted to provide notice and heard nothing back indicating that anything had gone awry." *Id.* at 227.

Mandating any additional investigative act as a component requirement of the Due Process Clause is a radical departure from current Constitutional Law, and would be tantamount to requiring that actual notice be assured, which this Court has consistently rejected.

C. The Trust is Not Responsible for the Actions of, Nor Chargeable With, the Knowledge of the Secretary of State

The Trust is not responsible for the actions of the Secretary of State in serving process. In arguing otherwise, Petitioner relies upon various lower court cases where a foreclosing party has been held responsible for the actions of the third party to whom service was delegated. These cases are all inapplicable to the issue at hand, most significantly because in them, the agent serving process was the *plaintiff's agent.* Here, the Secretary of State is the *Petitioner-corporation's own agent.*

In *Thompson-Green v. Estate of Drobish*, 2006 WY 126 (Wyo. 2006), personal service was required by statute, and there was no mention of any statute permitting substituted service.

In *Wilson v. Blount County*, 207 S.W.3d 741 (Tenn. 2006), the notice to be served was found to be defective as a matter of law, rendering the issue of proper service moot under the circumstances of that case.

In *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007), the Court rejected a framework where the government completely relied on a third party to give notice, rather

than where the government relied on a statutory scheme specifically designed to have the highest possible likelihood of giving actual notice, as in the instant matter, where corporations are required to keep their addresses for service updated with the Secretary of State.

Petitioner relies on *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) for a related point, arguing that the Secretary of State cannot be considered a corporation's agent for service under BCL §306. (Petition at 18).

In *Wuchter*, this Court held that the only question was whether the substituted service statute "contain[s] a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued." *Wuchter*, 276 U.S. at 18.

New York's BCL §306 obligates the Secretary of State to mail a copy of the process to an address designated by the party to be served.

Wuchter examined a statute permitting substituted service on the Secretary of State for non-resident motorists, individuals merely passing through the state, and not corporations registered to do business within the state. This Court in *Wuchter* further reiterated that corporations "may properly be required to accept service through a public officer as a condition of their doing business in the state." *Id.* at 20.

By asserting that the Trust is as responsible for the acts of the Secretary of State as it would be for the acts of a private process server, Petitioner ignores that

the Secretary of State is its own agent, and not the agent of the Trust. *Wuchter* is not to the contrary.

Petitioner improperly imputes the Secretary of State's knowledge to the Trust herein. The Trust is not the Secretary's principal. An agent's knowledge is imputed only to its principal. *National Bank v. National Herkimer County Bank*, 225 U.S. 178 (1912).

In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), (a case involving the Hague Convention), this Court held that: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends." *Id.* at 708.

Here too, New York courts hold that service is complete upon delivery to the Secretary of State. *Perkins v. 686 Halsey Food Corp.*, 36 A.D.3d 881 (2nd Dept. 2007).

This Court has refused to impute knowledge belonging to one state agency even to other state agencies, let alone city agencies. In *Jones*, this Court found that the State Lands Commissioner was not required to even look to State income tax rolls to determine Jones's address. *Jones* at 236 ("Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far.").

In the instant matter, it is not even an issue of one state agency versus another. Rather, here the Trust and the City are wholly distinct from the State of New York and its agencies, such as the Secretary of State.

The City of New York is not a division or agent of the State of New York. *See generally Hernandez v. Hammons*, 98 N.Y.2d 735 (2002); *see also* NY CLS St Admin P Act §102(1).

Petitioner cannot ellipse this relationship by simply implying that all government agencies are one and the same. New York State has 62 counties, which are subdivided into 932 towns and 62 cities. Cities such as New York have their own charter and executive, legislative and judicial branches highly distinct from the government of the State in which the City resides.

Thus, even if one State agency must consult with other State agencies in order to comply with *Jones*'s notice requirements for Due Process purposes, which this Court did not require under *Jones*, that rule would not apply as between the Trust or the City of New York, neither of which are State agencies, and the New York State Department of State, which manifestly is a New York State agency.

Notably, there has never been a suggestion that the Trust could have been informed of Petitioner's non-receipt of notice without making an active inquiry of the Secretary of State.

No matter how much Petitioner strains to analogize the facts here to those in *Jones*, it cannot erase the fact that the Trust never had any knowledge that its service through the Secretary of State resulted in the Secretary of State's certified mailing on Petitioner being returned unclaimed.

D. No Practical Alternative Steps Existed to Effectively Serve Petitioner

Petitioner besmirches the Trust's attempt at service of process upon the landowner, by oft repeating variations on the allegation that, a party who chooses to utilize the method of service permitted by BCL §306, does not act as one "desirous of actually informing" the owner.

Specifically, Petitioner erroneously states, without any evidentiary support, that: ". . . it is well known to New York practitioners that the substituted service statute the Trust elected to use here, BCL §306(b), commonly results in the failure of actual notice. . . ." (Petition at 17).

Petitioner then attempts to bootstrap this baseless assertion into a rule of Constitutional law invoking this Court's holding in *Greene v. Lindsay*, 456 U.S. 444 (1982), a case which held that the mere posting of a notice on a housing project apartment before the issuance of a final order of eviction violated Constitutional Due Process.

The Court in *Greene* apparently accepted the notion that service by the particular posting there failed "to afford actual notice in a 'not insubstantial' number of cases" *Id.* at fn 4. This "fact" in *Greene* was noted by the Dissent therein, as based upon "the scant and conflicting testimony of a handful of process servers in Kentucky." *Id.* at 456.

The factual predicate put forth by Petitioner in this case is based on no evidence whatsoever, in its Petition or as placed before the Courts below, and accordingly should be given no weight. In fact, one of the cases cited by Petitioner for its dubious proposition shows full well how New York Courts have dealt with those isolated instances where Secretary of State service was ineffective.

In *Mintz v. Astoria Holding Corp.*, 56 A.D.2d 595 (2nd Dept. 1977), the Appellate Division vacated the default judgment under NY CPLR 5015 because it found that the Defendant did not have actual notice of the suit until after the default judgment was entered, and met its burden of showing the existence of a "colorably meritorious defense". *Id.* at 596. This is exactly what Plaintiff tried to do in the New York State Supreme Court. That motion was denied only because Plaintiff failed to show it had a meritorious defense; not because the Court ignored Plaintiff's allegation that it never received actual notice.

Petitioner also claims that because the Trust knew, or should be charged with knowing Petitioner's correct address, it somehow should have been required to serve the summons by more direct means than through the Secretary of State.

Contrary to such assertion, it would not have been practicable, or in any way more reasonable for the Trust to utilize any other means of providing notice of the commencement of the foreclosure action, than the one utilized.

It is important to note that Petitioner herein is a corporation that cannot simply be served as an individual is served.

Under New York law, service on individuals may be made pursuant to CPLR 308, which provides for either personal delivery, or delivery to a person of suitable age and discretion at the actual place of business or usual place of abode coupled with mailing by regular mail, or posting of the summons at the actual place of business or usual place of abode coupled with mailing by regular mail.

If an individual is to be served in New York, one only need learn of that individual's actual place of business or usual place of abode in order to effect valid service.

Under New York law, a corporation may only be served pursuant to CPLR 311, which, in contrast to service on an individual, requires delivery to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law, including the Secretary of State.

Before one can be assured, *ex ante*, that service would be effective, one has to know the identity of "an officer, director, managing or general agent, or cashier

or assistant cashier or to any other agent authorized by appointment or by law to receive service".

Such knowledge is often impossible to ascertain, particularly for a small, private corporation, such as Petitioner.

One cannot look in a phone book, public record, internet web site, or other similarly accessible search device to learn the identity of "an officer, director, managing or general agent, or cashier or assistant cashier" or "any other agent authorized by appointment or by law to receive service" for the Petitioner.

Nor can one serve a corporation by mail upon any business address, or by personal delivery to just any person who appears to be employed at a corporation's business address.

Thus, service by substituted service upon the Secretary of State was the most reliable method available to the Trust for serving the Petitioner.

E. Court Proceedings That Offer Relief From Default Judgments Upon a Showing of Excusable Neglect and a Meritorious Defense Meet All Due Process Requirements

In *Jones*, the Executive Department of Arkansas, in pursuance of its tax collecting function, took title to the individual taxpayers home.

In this case, a judicial foreclosure proceeding was commenced, under which proceeding, an auction sale of

corporate Petitioner's property was sold. Since legal title had not passed to Respondent Carlton yet,[5] Petitioner employed the option available to it under NY CPLR 5015 to move for vacature of the default judgment of foreclosure and sale on the dual grounds of showing excusable neglect and a meritorious defense.

New York courts have held that a party's "right of due process was not violated since it was afforded an opportunity to vacate the default upon the showing of a meritorious defense." *Micarelli v. Regal Apparel, Ltd.*, 52 A.D.2d 524 (1st Dept. 1976).[6]

It is noteworthy that in Petitioner's initial motion for relief from the default judgment of foreclosure and sale, it made no showing of any meritorious defense and it was on that basis that its motion failed and its default was upheld.

Though Petitioner made an attempt to show a meritorious defense in its renewed motion for vacatur of the default judgment, the Appellate Division held that "the new facts submitted by 114 Tenth Avenue were

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5. Under New York law, equitable title passes at the time of auction, and record or legal title passes when the referee delivers a deed, which event has not yet occurred, due to the continued pendency of a stay issued by the New York State Supreme Court, pending appeal.

6. Corporate defendants served under *Business Corporation Law §306* have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend. *Solomon Abrahams, P.C. v. Peddlers Pond Holding Corp.*, 125 A.D.2d 355 (2nd Dept. 1986).

readily available at the time the prior motion was made and 114 Tenth Avenue failed to provide a reasonable justification for failing to present these facts in support of its initial motion. Appendix A to Petition for a Writ of Certiorari.

The fact that Petitioner was unsuccessful in its attempt to vacate the default judgment rendered against it does not mean that Petitioner was deprived of due process under the Federal Constitution.

CONCLUSION

For the foregoing reasons, Respondent Carlton Capital Corp. respectfully requests that this Court deny the Petition for a Writ of Certiorari and decline to review the New York Appellate Division decision and order below.

Respectfully submitted,

MICHAEL T. SUCHER, ESQ.
Counsel of Record
DANIELLE E. SUCHER, ESQ.
ANDREW M. SHABASSON, ESQ.
26 Court Street, Suite 2412
Brooklyn, New York 11242
(718) 522-1995

Counsel for Respondent
Carlton Capital Corp.

APPENDIX

NY CPLR 308

§ 308. Personal service upon a natural person

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing,

whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the

person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

Appendix

NY CPLR 311

§ 311. Personal service upon a corporation or governmental subdivision

(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for- profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;

2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or the clerk;

6. upon a village, to the mayor, clerk, or any trustee;

7. upon a school district, to a school officer, as defined in the education law; and

8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

(b) If service upon a domestic or foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article is impracticable under paragraph one of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs.

Appendix

NY CPLR 5015(A)

R 5015. Relief from judgment or order

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or

3. fraud, misrepresentation, or other misconduct of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

Appendix

NY St Admin P Act § 102(1)

§ 102. Definitions

As used in this chapter,

1. "Agency" means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of military and naval affairs to the extent it exercises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeal board, and except for purposes of subdivision one of section two hundred two-d of this chapter, the workers' compensation board and except for purposes of article two of this chapter, the state division of parole and the department of correctional services.

107

(5)

No. 08-184

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF

ADAM LEITMAN BAILEY
Counsel of Record
WILLIAM J. GELLER
JESSICA SCHERER
DOV TREIMAN
ADAM LEITMAN BAILEY, P.C.
120 Broadway, 17th Floor
New York, New York 10271
(212) 825-0365

Counsel for Petitioner

(Additional Counsel Listed on Signature Page)

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
I RESPONDENTS' EFFORTS TO AVOID THE ISSUE OF THE APPELLATE DIVISION'S PLAIN AND SIGNIFICANT ERROR IN FINDING THE TRUST TO BE A PRIVATE ACTOR DEMONSTRATE THE NEED FOR CERTIORARI	3
II CERTIORARI SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING SUFFICIENT NOTICE OF THE FORECLOSURE ACTION	5
A. In Seeking to Distinguish *Jones* Respondents Ignore the Unique Information that 114 Tenth Was Continuing to Pay Taxes and that the Trust Failed to Comply With a Trial Court Order for Additional Notice ...	5

Contents

Page

B. Nearly All States Find It Practical and Preferable to Attempt Personal Service before Substituted Secretary Service 8

C. New York Procedure Contains No Effective Measures To Avoid the Well-Recognized Deficiencies in BCL § 306(b) Service in Real Property Cases 10

CONCLUSION 13

APPENDIX – NEW YORK CIVIL PRACTICE LAW & RULES § 3215(g)(4) 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Brentwood Academy v. Tenn. Secondary School Athletic Ass'n, 531 U.S. 288 (2001) 3

Citibank N.A. v. Joffe, 265 A.D.2d 291, 696 N.Y.S.2d 190 (2d Dep't 1999) 7

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 12

Froland v. Yamaha Motor Co., 296 F. Supp. 2d 1004 (D. Minn. 2003) 11

Hanover Fire Ins. Co. v. Carr, 272 U.S. 494 (1926) 12

Howard v. Jenny's Country Kitchen, Inc., 223 F.R.D. 559 (D. Kan. 2004) 11

Interior Distributors, Inc. v. Hartland Construction Co., 116 N.C.App. 627, 449 S.E.2d 193 (Ct. App. N.C. 1994) 8

Jones v. Flowers, 547 U.S. 220 (2006) ..... *passim*

Cited Authorities

Page

Micarelli v. Regal Apparel, Ltd.,
52 A.D.2d 524, 381 N.Y.S.2d 511
(1st Dep't 1976) 9

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 11

TC Drywall & Plaster, Inc.
v. Express Rentals, Inc.,
287 Ga.App. 624, 653 S.E.2d 70
(Ga.App. 2007) 9

Tulsa Professional Collection Services, Inc.
v. Pope, 485 U.S. 478 (1988) *3*

CONSTITUTIONAL PROVISION AND STATUTES

New York Business Corporations Law (BCL)
§ 306(b) ..... *passim*

New York Civil Practice Law & Rules (CPLR)
§ 317 11

New York Civil Practice Law & Rules (CPLR)
§ 3125(g)(4) 16

New York City Administrative Code (NYC Code)
§ 11-332(a) 7

Page

OTHER AUTHORITY

Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747 (2000) 3

INTRODUCTION

Respondents' Oppositions to the Petition are noteworthy for the points they ignore. First, they provide no real defense of the plain error committed by the Appellate Division in its core ruling that the Plaintiff Trust,[1] which was created by the City to securitize municipal tax liens, is a private actor for due process purposes. This error is significant in that affirming an improper classification will allow this Trust and similar NYCTL Trusts, as well as tax trusts to be established around the country, to avoid their state actor obligations not only in this case, but in all of their future activities.[2]

The Respondents conveniently disregard that 114 Tenth continued to pay its property taxes while the foreclosure was proceeding, the sort of "unique information" that should have been used as a clear indication that 114 Tenth was likely unaware that its Property was in foreclosure. Similarly, the Respondents ignore that the Trust simply failed to comply with the trial court's requirement that it serve an interlocutory order on 114 Tenth, something which would have notified the company that its property was being foreclosed. Moreover, even if this Court were to disregard the facts

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1. Unless otherwise specified, the defined terms used in this Reply shall have the same meanings as those in the Petition.

2. With the recent federal conservatorship of Freddie Mac and Fannie Mae and the ongoing formulation of a U.S. Treasury buyout of much of the mortgage industry, it may well become even more critical for this Court to offer guidance on how government instrumentalities shall provide due process in real estate foreclosures.

that the Respondents conveniently ignore, it should apply *Jones v. Flowers*, 547 U.S. 220 (2006) to disapprove tax lien foreclosures where the plaintiff knows the taxpayer's actual business address but chooses nevertheless to use, but not monitor, a service method with high risks of non-delivery.

Respondents protest that a method of providing notice other than BCL § 306(b) would be unworkable, ignoring that every other state but one prohibits such Substituted Secretary Service, at least before a good-faith attempt at a more direct method of service is attempted. Further, New York has a simple procedure which, though not required in tax foreclosures, would have remedied the due process deficiencies here: mailing the process to the last known address of the corporate defendant prior to obtaining a default judgment. Moreover, though New York has an inapplicable procedure which could have remedied the due process problems, the other elements of New York law that Respondents claim to mitigate these problems do not lessen the denial of 114 Tenth's due process rights.

I

RESPONDENTS' EFFORTS TO AVOID THE ISSUE OF THE APPELLATE DIVISION'S PLAIN AND SIGNIFICANT ERROR IN FINDING THE TRUST TO BE A PRIVATE ACTOR DEMONSTRATE THE NEED FOR CERTIORARI

Central to the decision of the Appellate Division below was its holding that *Jones* was inapplicable because "process was served by a private actor" not by the government. (App. A at 2a). Not disputing 114 Tenth's detailed analysis as to why the Trust is a governmental actor, Respondents seek to diminish the significance of this ruling. Carlton attempts to avoid the ruling entirely in its Opposition (at 8), conceding that "state action is presumed to be present." [3] The City Respondents attempt to dismiss the argument in the last paragraph of their Opposition (at 13) by claiming that the issue is an immaterial "red herring."

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3. Though it concedes the state action point, Carlton claims it to be "very much an open issue" based on its gross misreading of 2000 law journal article. The article explains that even truly private tax lien investors may be subject to governmental due process requirements, noting in a footnote that: "the essential elements [of state action] as established by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) appear to be present." Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747, 764 & n.102 (2000). As the Petition makes clear, *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001), decided after that article was written, definitively establishes that the Trust is a state actor.

However, the question of whether a municipally-established Trust securitizing $48 million in City tax liens (along with its sister NYCTL Trusts securitizing more than $1.6 billion in tax liens) is bound by the broad panoply of duties the Constitution imposes upon state actors is anything but a triviality. Indeed, the holding below that city-created tax lien trusts are private actors has created a huge loophole for municipalities around the country to jump through to avoid due process requirements. At the very least, the Appellate Division's decision inoculates the entire family of New York City securitized trusts against governmental actor obligations.

Respondents avoid the state actor question because they realize that the Appellate Division's holding is indefensible. Had the Appellate Division found the Trust to be a state actor, it would have had to undertake a due process analysis under *Jones* and vacate the default. As such, this Court should, at the very minimum, remand this case for further findings on whether the Trust, as a state actor, afforded 114 Tenth its Fourteenth Amendment due process rights. More properly, however, because this Court has a sufficient record to find that 114 Tenth was denied due process, it should grant certiorari on both questions and reverse the decision below.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING SUFFICIENT NOTICE OF THE FORECLOSURE ACTION

A. In Seeking to Distinguish *Jones* Respondents Ignore the Unique Information that 114 Tenth Was Continuing to Pay Taxes and that the Trust Failed to Comply With a Trial Court Order for Additional Notice

Respondents contend that the Trust's obligation under *Jones* to consider "unique information" about the foreclosed taxpayer extends only to information that has happened to come to its actual attention, and that it has no further obligation to act as though it actually desired to inform 114 Tenth. 547 U.S. at 230. They argue the Trust will avoid any *Jones* due process obligations if it insulates itself by intentionally avoiding learning anything about the taxpayer whose property it is seeking to take. They claim that the Trust has successfully avoided learning any "unique information," so their strictly circumscribed reading of *Jones* means they need do nothing else. However, their arguments disregard that the Trust, as the City's alter ego, was charged with the knowledge of and obligated to consider that 114 Tenth continued to pay taxes, in obvious ignorance of the tax lien sale and foreclosure action.

When the City conveyed the tax liens to the Trust, it wrote the amount of the delinquencies off from its accounting records, so that taxpayers inquiring of the City about the taxes due on their properties would not be told of any the debts "sold" to the Trust. This created a distinct trap for the unwary because a taxpayer unsure of its tax debts would be misled about the total it owed it if it asked the City for its balance. 114 Tenth fell squarely into this trap when it asked for and paid its tax balance on February 10, 2003, and was not told of the outstanding amounts that had been transferred to the Trust. As a result, 114 Tenth was misled into the erroneous conclusion that had satisfied its tax debt and its Property would not be at risk of foreclosure.[4]

114 Tenth's tax payment shortly before this foreclosure was commenced, and its continuing payments thereafter, were clear indications that it was not disregarding its tax obligations or abandoning its Property for its tax debts. Such payments were "unique information about an intended recipient" that *Jones* required to be considered "regardless of whether a statutory scheme is reasonably calculated to provide

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4. 114 Tenth was admittedly inconsistent in paying its property taxes precisely when due, but it understood that it was inconsistent so its President would periodically visit the City's tax offices to obtain and pay the precise balance due that day. However, even inconsistent taxpayers, or worse, those who fail to pay taxes entirely such as the petitioner in *Jones*, are entitled to at least a fair opportunity to get notice of its tax foreclosure, particularly where their actual addresses are on file with the tax authorities.

notice in an ordinary case." 547 U.S. at 230.[5] As such, where a taxpayer continues to make tax payments which are accepted by the City, it should at the very least trigger a duty to investigate further whether the taxpayer has been given notice of the foreclosure, even if not *per se* invalidating the foreclosure as a whole. *See Citibank N.A. v. Joffe*, 265 A.D.2d 291, 696 N.Y.S.2d 190 (2d Dep't 1999) (reversing summary judgment on question of whether lender had waived right to foreclose by accepting payments). Because the Trust did nothing in the face of 114 Tenth's continuing tax payments, it violated the requirement of *Jones* to provide additional notice when it was presented with unique information suggesting non-receipt of notice by the taxpayer.

The Trust also failed to comply with the trial court's directive that it serve the Amended Order of Reference on 114 Tenth. Although the trial court did not explain why it required such service here, foreclosure courts routinely require service of interlocutory orders to provide even non-responsive property owners notice of the progress of their foreclosures actions. Had this order been mailed to 114 Tenth at its known address, it would received at least some pre-judgment notice that the foreclosure was proceeding against it. The Trust's failure to comply with this additional court-ordered notice reinforces that the Trust had no actual desire to

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5. Although 114 Tenth's tax payments were technically made to the City, the Trust is required to "stand in the same position as the city [as though] the tax liens had not been sold." NYC Code § 11-332(a). As such, the Trust must be charged with the knowledge the City had of 114 Tenth's tax payments. Respondents do not dispute that knowledge gained by the City must be imputed to the Trust.

inform 114 Tenth, but rather intended only to proceed without the inconvenience of having the taxpayer there to actually defend.

Moreover, even without additional unique information, *Jones* should be applied to require foreclosing governmental entities to actually monitor the methods of service they select to assure that service does not go awry in a readily predictable manner. This is particularly necessary where the foreclosing plaintiff knows the actual address the taxpayer uses for ordinary correspondence, but disregards it. *See Interior Distributors, Inc. v. Hartland Construction Co.*, 116 N.C.App. 627, 632, 449 S.E.2d 193, 195-96 (Ct. App. N.C. 1994) (where plaintiff knew defendant's address, "substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights").

B. Nearly All States Find It Practical and Preferable to Attempt Personal Service before Substituted Secretary Service

Both Respondents argue that the idea of serving a corporation other than upon the Secretary of State under BCL § 306(b) as unworkable. While it is unquestionably more convenient to have a government office at which a stack of foreclosure summonses can simply be dropped off with no further service requirements, most jurisdictions are leery enough of the due process problems associated with such naked Secretary service to forbid it in the first instance. Fifteen States do not permit corporations to be served through governmental officials at all. Thirty-three other

States plus the District of Columbia only permit Substituted Secretary Service on domestic or registered foreign corporations after at least one prior attempt at personal service. That leaves only two States, New York and West Virginia, that permit domestic corporations like 114 Tenth to be served through the Secretary of State in the first instance.

Respondents' obvious preferences for simplicity notwithstanding, the overwhelming majority of jurisdictions have no problem requiring plaintiffs to do more than BCL § 306(b) requires. As just one example, Georgia law holds that "a plaintiff cannot substitute service upon the Secretary of State under that statute when the plaintiff has actual knowledge of the corporation's location." *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga.App. 624, 625, 653 S.E.2d 70 (Ga.App. 2007) (rejecting attempt at service on obsolete address of registered agent filed with Secretary). Such service rules stand in stark contrast to New York, where substituted service *ab initio* is held valid irrespective of whether process physically reaches the corporate defendant and irrespective of whether other means more assured to deliver actual notice were readily and inexpensively available. *Micarelli v. Regal Apparel. Ltd.* 52 A.D.2d 524, 524, 381 N.Y.S.2d 511, 512 (1st Dept. 1976) (service valid even where Secretary never mailed process).

Carlton claims that 114 Tenth has failed to demonstrate that resort to BCL § 306(b) frequently, and often intentionally, results in non-service. As was more fully set forth in the Petition (at 21-25), this procedural fact is well-documented by New York case law and by

its leading civil procedure commentator. Indeed, the New York Legislature recognized and partially addressed the problem in 1990 when it amended the default judgment procedure to require, in most cases, an additional mailing of process to "the corporation at its last known address." *See* CPLR § 3215(g)(4) (Reply App.). However, 114 Tenth did not receive the benefit of such additional notice because the statute carves out an exception for defendants who have defaulted in "actions affecting title to real property." *See* CPLR § 3215(g)(4)(iii). As the Trust could have solved the due process problem by the simple and minimally burdensome step of mailing a copy of the process to 114 Tenth at its last known address (which was in fact already listed on the face of the Summons), Respondents' argument that the due process deficiencies of BCL § 306(b) cannot be remedied in any practical manner must be rejected.

C. New York Procedure Contains No Effective Measures To Avoid the Well-Recognized Deficiencies in BCL § 306(b) Service in Real Property Cases

Despite the well-recognized deficiencies in BCL § 306(b), Respondents ineffectually suggest that several particular elements of New York corporate and procedural law ameliorate those deficiencies.

Respondents suggest that all of their due process problems are solved because process was served on a statutory agent of 114 Tenth, the Secretary of State, and service on a corporation's agent automatically affords it due process (citing only New York cases).

Respondents, however, ignore the authority cited in the Petition (at 18-19) that a forced, statutory designation of a government official as an agent of a corporation does not render that official an actual agent. Unsurprisingly, courts outside New York reject the idea that Substituted Secretary Service provides due process regardless of delivery of notice to the corporation or one of its actual agents. *Howard v. Jenny's Country Kitchen, Inc.*, 223 F.R.D. 559, 564-65 (D.Kan. 2004) (due process denied when Corporation served through Secretary as agent and Secretary mailed process to incorrect address); *Froland v. Yamaha Motor Co.*, 296 F. Supp. 2d 1004, 1008 (D.Minn. 2003) (though Secretary was served as agent, no due process where Hague Convention prohibited Secretary from completing service by mail).

Respondents also suggest that there is no due process issue because 114 Tenth could have vacated its default as a party not personally served if 114 Tenth had asserted a meritorious defense, *see* CPLR § 317, something the Appellate Division found it had not done. (App. A at 2a). However, as this Court recognized in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988), where due process fails, it is improper to require a meritorious defense because the defendant has been deprived of the opportunity to have "worked out a settlement or paid the debt[, or] sell his property himself in order to raise funds rather than to suffer it to be sold at a constable's auction."[6]

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6. Indeed, recent headlines make it clear that governments should be promoting every opportunity to obtain settlements or payoffs of debts, to avoid the economic damage caused by forced foreclosure sales.

Finally, Respondents suggest that submitting to BCL § 306(b) service is an essential part of the bargain that a company makes with the state by incorporating, and that a corporation forfeits all of its due process rights to notice and makes service impossible when it fails to keep its notice address updated with the Secretary.[7] However, it is long-settled precedent of this Court that "corporations are persons within the meaning of the Fourteenth Amendment," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n. 15 (1978), and that a State may not "exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed." *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507 (1926). More significantly, in *Jones*, this Court rejected the idea that "failure to comply with a statutory obligation to keep [an] address updated forfeits [the] right to constitutionally sufficient notice." 537 U.S. at 232. Where a governmental tax foreclosure plaintiff has the taxpayer's address immediately before its face, *Jones* does not allow the plaintiff to slam its eyes shut to the fact that the taxpayer failed to receive notice because of an incorrect address on file with an otherwise unrelated agency.

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7. 48 other States do not make a having a current address on file central to whether a corporation receives notice of litigation because they either require plaintiffs to attempt personal service before resorting to Substituted Secretary Service or prohibit Substituted Secretary Service altogether.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, Petitioner 114 Tenth Avenue Assoc., Inc. respectfully requests that this Court grant a writ of certiorari to review the Appellate Division decision below.

Respectfully submitted,

ADAM LEITMAN BAILEY
Counsel of Record
WILLIAM J. GELLER
JESSICA SCHERER
DOV TREIMAN
ADAM LEITMAN BAILEY, P.C.
120 Broadway, 17th Floor
New York, New York 10271
(212) 825-0365

DONALD R. DINAN
ROETZEL & ANDRESS
1300 Eye Street, N.W., Suite 400 East
Washington, D.C. 20005
(202) 625-0600

JOEL M. SHAFFERMAN
THE LAW OFFICES OF
JOEL SHAFFERMAN, LLC
350 Fifth Avenue, Suite 2723
New York, New York 10118
(212) 509-1802

Counsel for Petitioner

APPENDIX — NEW YORK CIVIL PRACTICE LAW & RULES § 3215(g)(4)

New York Civil Practice Law & Rules § 3215(g)(4) provides as follows:

§ 3215. Default Judgment

(g) Notice. . . .

4. (i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

(ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure

of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

(iii) This requirement shall not apply to cases in the small claims part or commercial claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property.

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